APPENDIX

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-5353

RUFUS JUNIOR MINCEY,

Petitioner,

—*vs.*—

ARIZONA,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARIZONA

PETITION FOR CERTIORARI FILED AUGUST 29, 1977
CERTIORARI GRANTED OCTOBER 17, 1977

In the Supreme Court of the United States

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RUFUS JUNIOR MINCEY,

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—*vs.*—

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TPD #827400 (Bunting)

IN THE SUPERIOR COURT OF THE
STATE OF ARIZONA
IN AND FOR THE COUNTY OF PIMA

No. A26666

STATE OF ARIZONA, PLAINTIFF

vs.

RUFUS JUNIOR MINCEY, DEFENDANT(S)

WARRANT FOR ARREST

TO ALL PEACE OFFICERS IN THIS STATE:

A Complaint, Indictment or Information has been duly filed in this court which accuses

RUFUS JUNIOR MINCEY

and charges that in Pima County:

COUNT ONE
(MURDER—1st Degree)

On or about the 28th day of October, 1974, RUFUS JUNIOR MINCEY, murdered BARRY W. HEADRICKS, all in violation of A.R.S. § 13-451, § 13-452 and § 13-453.

COUNT TWO
(ASSAULT WITH A DEADLY WEAPON)

On or about the 28th day of October, 1974, RUFUS JUNIOR MINCEY, assaulted CHARLES FERGUSON with a deadly weapon or instrument, to wit: a gun, all in violation of A.R.S. 13-249 B, as amended.

COUNT THREE
(UNLAWFUL SALE OF NARCOTICS)

On or about the 28th day of October, 1974, RUFUS JUNIOR MINCEY, unlawfully offered to sell to another a narcotic drug, to wit: heroin, all in violation of A.R.S. § 36-1002.02.

COUNT FOUR
(UNLAWFUL POSSESSION OF
NARCOTIC DRUG FOR SALE)

On or about the 28th day of October, 1974, RUFUS JUNIOR MINCEY, unlawfully possessed for sale a narcotic drug, to wit: heroin, all in violation of A.R.S. § 36-1002.01.

COUNT FIVE
(UNLAWFUL POSSESSION OF A
NARCOTIC DRUG)

On or about the 28th day of October, 1974, RUFUS JUNIOR MINCEY, possessed a narcotic drug, to wit: heroin, all in violation of A.R.S. Section 36-1002, as amended.

The court has found reasonable cause to believe that such offense(s) were committed and that the accused committed them, and reason to believe that the accused will not appear in response to a summons, or that a warrant is otherwise appropriate.

YOU ARE THEREFORE COMMANDED to arrest the accused and bring him before this court to answer the charges. If this court is unavailable, or if the arrest is made in another county, you shall take him before the nearest or most accessible magistrate. You may release him if he posts a secured appearance bond in the amount of to be set at Int Opp dollars.

Given under my hand and seal on November 1, 1974, at the direction of the court.

FRANCIS C. GIBBONS
Clerk of the Superior Court

By /s/ [Illegible]
Deputy Clerk

CERTIFICATE OF EXECUTION

I certify that I arrested Rufus Mincey at 10:20 a.m. on Nov. 5, 1974, and presented him before Judge ——— at ———.

Will be presented when possible.

Tucson P.D.
Agency

/s/ Det. L. Hust
Deputy Sheriff/Officer

IN THE SUPERIOR COURT OF THE
STATE OF ARIZONA
IN AND FOR THE COUNTY OF PIMA

No. A-26666

[Title Omitted in Printing]

MOTION TO SUPPRESS
UNLAWFUL SEARCH AND SEIZURE

COMES NOW the Defendant, RUFUS JUNIOR MINCEY, by and through his attorney, RICHARD OSERAN, and respectfully moves this Court for an order suppressing any and all evidence seized as the result of a search conducted at The Colony Apartments, Apartment 211, located at 1150 East Eighth Street, Tucson, Arizona, for the reasons and grounds set forth more fully in the attached *Memorandum* and the facts that will be adduced at the hearing of this matter.

FACTS

On October 28, 1974, Officer Headricks, in the company of six other plainclothed police officers with guns drawn knocked on the door of Apartment 211 at The Colony Apartments located at 1150 East Eighth Street. The purpose of the officers was to effect the warrantless probable cause arrest of the apartment's occupants. When the door of the apartment was opened, Officer Headricks stepped inside, Officer Schwarz attempted to follow Officer Headricks through the door, before he could get through the doorway, the door was slammed on him. Officer Schwarz forced the door open and almost immediately thereafter shots were heard in the bedroom. After the shooting had ceased, Officer Headricks and three of the apartment occupants lay wounded and the remaining two occupants were in the custody and control of the six other officers. The six officers then present conducted no search and did nothing further in regard to the apartment. Officer Fuller testified at the grand jury proceeding to the following:

Question: OK, what occurred then after you went back in the living room? What did you do?

Answer: I yelled for somebody to call Rescue, and an ambulance, and I was told it was already done. Beyond that, it was just a question of waiting. We have departmental policies which indicate any time that there is a shooting incident, that the people involved will secure everything just the way it is and wait until other personnel can arrive and then the other personnel will handle the investigation, so that we aren't investigating our own actions. So, other than wait for medical help, and see that nobody destroyed any of the evidence, just preserve the scene until it was taken off my hands.

Question: In this case, it was the homicide detail of the Tucson Police Department that took over the investigation; is that correct?

Answer: Yes, sir.

(Grand Jury Transcript, Page 30.)

Question: Was the caliber of that weapon, that automatic weapon, later determined?

Answer: I believe so. As I indicated, we—at this point I didn't allow, other than keeping the people secured—there was the male that opened the door and the girl in the living room—other than keeping these people secured, I had my people do absolutely nothing, so we didn't—I didn't even pick the gun up. We didn't conduct any search or anything else. We stopped all operation right there until such time as the investigation, the people who handle it, showed up.

Question: So even a search of the apartments with regard to the presence of narcotics would have been performed by the homicide detail?

Answer: Yes, sir, or people assigned to them, but not any of us that were involved in it.

(Grand Jury Transcript, Pages 35 and 36.)

Detective Morris Reyna of the Tucson Police Department was advised to respond to the apartment where he

was placed in charge of the crime scene. Detective Reyna stayed in and conducted a search of the apartment, which was concluded at 3:00 a.m. on October 29, 1974. At no time did Detective Reyna or any other officer attempt to secure or secure a search warrant.

> Question: Did your detail then take over the investigation from that point? That is, as opposed to the Metropolitan Narcotics Squad investigating the incident?
>
> Answer: Yes, we took complete charge of the investigation.
>
> Question: Did you have occasion to in the course of that investigation search the apartment?
>
> Answer: Yes, sir, I did.
>
> (Testimony of Detective Morris Reyna, Page 57, Grand Jury Transcript.)

MEMORANDUM

"The most basic constitutional rule in this case is that 'searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions.' 1. The exceptions are 'jealously and carefully drawn,' 2. and there must be 'a showing by those who seek exemption * * * that the exigencies of the situation made that course imperative.' 3. '[T]he burden is on those seeking the exemption to show the need for it.' 4." *Collidge* v. *New Hampshire*, 403 U.S. 443, 455 (1971). 1. *Katz* v. *United States*, 389 U.S. 347, 357. 2. *Jones* v. *United States*, 357 U.S. 493, 499. 3. *McDonald* v. *United States*, 335 U.S. 451, 456. 4. *United States* v. *Jeffers*, 342 U.S. 48, 51. *United States* v. *Soriano*, 482 F.2d 469 (1973).

The search of Apartment 211 of The Colony Apartments was not a search incident to a lawful arrest. "A search or seizure without a warrant as incident to a lawful arrest has always been . . . strictly limited . . . It grows out of the inherent necessity of the situation at the time of the arrest." *Chimel* v. *California*, 395 U.S. 752 (1969). This exception has its justification in

the "need to seize weapons and other things which might be used to assault an officer or effect an escape, as well as by the need to prevent destruction of evidence of the crime things which might easily happen where the weapon or evidence is on the accused person or under his immediate control. But these justifications are absent where a search is remote in time or place from the arrest." *State* v. *Madden*, 105 Ariz. 383, 465 P.2d 363 at 364 and 365 (1970). In the present case as in *State* v. *Madden*, *supra*, at Page 365 "plainly, the search was too remote in time . . . to be justified absent a warrant. In *all situations* (emp. sup.) searches made incident to a lawful arrest are limited by the principle that police must, whenever practicable, obtain a judicial warrant atuhorizing the protective search."

It is clear that the "investigating officers" investigating the crime had adequate time to procure a warrant and failed to do so, thus, the search was unlawful.

A case on point is *U.S.* v. *Curran*, 498 F.2d 30 (1974) 9th Circuit in which officers found one and one-half pounds of marijuana in plain view on a table. At the time of discovery, the officers had not secured the house and had not yet accounted for the occupants. "The 50 kilos were not discovered until after the occupants had been arrested and the house had been secured. The 50 kilos were not in the open, but in a closed cupboard. The trial judge suppressed this. It was not within the scope of a search justified by the circumstances" *Curran*, *supra*, at 36. The issue in *Chimel*, *supra*, was whether a warrantless search of the Defendant's house could be justified as incident to the arrest of the Defendant. The Court, in *Chimel*, held that there was no justification in the absence of a search warrant, for extending the search beyond the petitioner's person in the area from which he might have obtained either a weapon or something that could have been used as evidence against him, that the search was therefore unreasonable under the Fourth and Fourteenth Amendments, *Chimel*, *supra*, Page 768.

The only other arguable exception to the general rule that warrantless searches of homes are per se unreasonable, was first found in the United States in *State* v.

Sample, 107 Ariz. 407, 489 P.2d 44 at 47 (1971). "The traditional right of citizens to be free from unreasonable searches and seizures and unreasonable and unnecessary invasions of their privacy is not violated when the premises upon which a deceased victim is found are searched without a warrant. The need for all citizens, and particularly potential victims such as this to effective protection from crime, particularly while in their own home, would indicate that a warrantless search of the premises is not made unreasonable or unconstitutional by the fact that the defendant exercises joint control over the premises." Thus, the exception created seemed to allow the police to search a crime scene where the premises searched was one either controlled or jointly controlled by the deceased victim, and the body of the deceased victim was found on the premises.

The Ninth Circuit, however, reversed *Sample*, *supra*, in *Sample* v. *Eyman*, 469 F.2d 819 (1972). "Appellee concedes and the record below clearly indicates that this was not a search incident to a lawful arrest . . . and under the circumstances present, a search warrant was necessary . . . there was no danger that evidence would be secreted or destroyed since the empty dwelling was being guarded by a policeman. The appellee having given no reason why a warrant could not be obtained, we find the failure to have done so constitutional error."

The Arizona Supreme Court refers to the *Sample* decision in *State* v. *Duke*, 110 Ariz. 320, 518 P.2d 570 (1974), where it refers to the language in *Sample* to immediate searches at the crime scene which were instigated by representations made to officers by the defendant. "Our holding in *Sample* . . . has been disapproved by the Ninth Circuit Court of Appeals . . . we believe, however, that this case is distinguishable from *Sample* . . . in *Sample*, the search occurred two hours or more after the officers first discovered the body of the deceased, and had it moved from the premises . . . in the instant case, the officers at the scene of the crime proceeded to make a search of the area, relying at first on the representations of the defendant that the deceased had committed suicide. *Under these circumstances* (emp. sup.), the contemporaneous warrantless search of the

scene of a crime at the time of the discovery of the body was we believe, reasonable." *Duke*, *supra*, at 572. For the reason that the defendant in *Duke*, *supra*, called the police and invited them into the house it appears that this case, in fact, was based on the defendant's consent to the search.

Nevertheless, it is clear that the present case is distinguishable from *Duke*, *supra*. There was no discovery of a body at the scene, though the victim was wounded at Apartment 211 of The Colony Apartments, he was immediately removed and expired at a later time in a hospital. There were no representations made by the defendant which would spur a search or act as consent to search. A contemporaneous search was not carried out at the scene by the officers, but rather, at a later time, by other officers. The defendant, not the victim, was the sole possessor of the premises searched.

Also, in the present case, the police went to Apartment 211 with the specific intent to conduct an arrest and search, where in *Duke*, *supra*, they were called to the house by the defendant. Any search based on this "crime scene theory", a theory accepted by no jurisdiction, would be limited to those implements used in the commission of the crime and could not evolve into a "general search". In the present case, the warrantless search continued for nearly 12 hours, in which every item in every room of the premises was itemized.

For all of the foregoing, the Court should grant the Defendant's motion.

RESPECTFULLY SUBMITTED this 15 day of January, 1975.

BOLDING, OSERAN & ZAVALA

BY /s/ Richard Oseran
RICHARD OSERAN
P.O. Box 70
La Placita Village
Tucson, Arizona 85702

[Certificate of Service Omitted in Printing]

IN THE SUPERIOR COURT OF THE
STATE OF ARIZONA
IN AND FOR THE COUNTY OF PIMA

No. A-26666

[Title Omitted in Printing]

MOTION TO SUPPRESS
INVOLUNTARY STATEMENTS

COMES NOW the Defendant, RUFUS JUNIOR MINCEY, by and through his attorney, RICHARD OSERAN, and moves the Court to suppress any and all statements of the Defendant in violation of his rights under the Fifth Amendment of the United States Constitution.

FACTS

On October 28, 1974, at the Arizona Medical Center, Detective Hust of the Tucson Police Department came into contact with the Defendant, Rufus Junior Mincey, shortly after a shooting incident for which the Defendant is charged under Counts One and Two. This initial contact took place in the emergency room after Detective Hust was requested by hospital personnel to remove handcuffs from two suspects. Detective Hust removed the handcuffs from the Defendant while the Defendant was being worked on by doctors and nurses for wounds he received. Shortly thereafter, the Defendant was removed from the emergency room and taken to the intensive care unit where he was interrogated by Detective Hust. The Defendant could not speak due to a tube that was forced down his throat to enable him to breath. The Defendant also was receiving medication and sustenance intravenously. Detective Hust began his interrogation and requested the Defendant to write out his answers because the Defendant was unable to speak.

The detective's questioning began by asking the Defendant to supply information that would be helpful in locating the family of another wounded suspect. The

Defendant was then advised of his rights, and he thereafter advised the detective that he could say no more without a lawyer. The Defendant asked for a lawyer approximately six more times during the course of the interrogation. The questioning did not cease, nor was a lawyer ever provided during the course of the interrogation. Approximately eight times during the questioning the Defendant expressed his uncertainty, as to his ability at that time, to accurately recall the facts of the incident. The Defendant also advised the police officer that he was experiencing unbearable pain.

MEMORANDUM

The Defendant was clearly in the custody of law enforcement officers prior to the time he was interrogated. Any statements, whether exculpatory or inculpatory, made by the Defendant prior to being advised of his Miranda warnings are inadmissible. *Miranda* v. *Arizona*, 384 U.S. 436, at 444 and 445 (1966), 86 S. Ct. 1602, at 1612.

After Detective Hust advised the Defendant of his constitutional rights, the Detective asked the following questions and received the following written responses:

> Question: What do you remember that happened?
> Answer: I remember somebody standing over me saying "move Nigger, move." I was on the floor beside the bed.
> Question: Do you remember shooting anyone or firing a gun?
> Answer: This is all I can say without a lawyer.

At this point, the police may not ask further questions. In the present case, Detective Hust continued his interrogation of the Defendant. Therefore, all statements made by the Defendant, whether exculpatory or inculpatory, are inadmissible.

> "It clearly states in *Miranda* v. *Arizona*, *supra*, that if a suspect indicates in any matter at any stage of the process that he wishes the aid of an attorney, 'there can be no questioning'." *Arizona* v. *Edwards*,

No. 3002 at Page 7, filed December 23, 1974, and *Miranda* v. *Arizona*, 384 U.S. at 445, 86 S.Ct. at 1612.

It is further urged that any statements made by the Defendant be held inadmissible for any purpose. For reasons as set forth in the *Facts* above, the trustworthiness of the evidence does not satisfy legal standards. *Harris* v. *New York*, 401 U.S. 222 at 224, (1971), *State* v. *Dixon*, 15 Ariz. App. 62 at 63 and 64 (1971). Specifically, that the Defendant requested a lawyer seven different times, that he advised the officer eight times that he could not, at that time, clearly recall the facts, that at one time he suggested that "without a lawyer, I might say something thinking it was something else". Also, that the Defendant complained of pain twice, describing it as being "unbearable".

In order for a prior statement to be admitted for impeachment purposes, the statement must be directly, substantially, and materially contradictory to the testimony in issue. *Arizona Law of Evidence*, Udall, Section 63, Page 88. It is further requested that in light of the foregoing, if the Defendant's statements are admissible for any purpose, that the State first make a showing out of the presence of the jury, that Defendant's testimony at trial "contrasted sharply" with such previous statements. *Harris* v. *New York*, *supra.* at Page 225.

It has long been the rule in Arizona that confessions are prima facie involuntary and the burden is on the State to show the confession was freely and voluntarily made. *State* v. *Edwards*, *supra.*, at Page 7.

For all the foregoing, Defendant's Motion to Suppress all Statements of the Defendant should be granted.

RESPECTFULLY SUBMITTED this 15 day of January, 1975.

BOLDING, OSERAN & ZAVALA

By /s/ Richard Oseran
RICHARD OSERAN

IN THE SUPERIOR COURT OF THE
STATE OF ARIZONA
IN AND FOR THE COUNTY OF PIMA

No. A-26666

[Title Omitted in Printing]

OPPOSITION TO MOTION TO SUPPRESS

COMES NOW the State of Arizona, by and through the Pima County Attorney, DENNIS DeCONCINI, and his Deputy, JAMES M. HOWARD and opposes the defendant's Motion to Suppress based on the unlawfulness of the search and seizure on the ground that any search and seizure occurring herein was performed in accordance with the laws of the State of Arizona and the Constitution of the State of Arizona and the United States.

The attached Memorandum of Points and Authorities is made a part hereof by reference.

WHEREFORE, the State of Arizona respectfully requests that the defendant's Motion to Suppress be denied.

Respectfully submitted this 28th day of January, 1975.

DENNIS DECONCINI
Pima County Attorney

/s/ James M. Howard
JAMES M. HOWARD
Deputy County Attorney

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MEMORANDUM OF POINTS AND AUTHORITIES

In the course of arresting occupants of defendant's apartment and of securing medical assistance for Officer Headricks and others injured, officers necessarily entered every room of the apartment and had a right to do so. *United States* v. *Briddle*, 436 F.2d 4 (8th Cir. 1970); *United States* v. *See*, 308 F.2d 715 (4th Cir. 1962). Nothing in *Chimel* v. *California*, 395 U.S. 752, 23 F.2d 685 (1969) alters this right of police officers to secure their arrests by inspection of the premises. See *Briddle*, *supra*.

During the course of these arrests and of securing necessary medical aid for the three wounded persons, any evidence which fell into the officers' open view could be seized. *Harris* v. *United States*, 390 U.S. 234, 236, 19 L.Ed.2d 1067 (19—); *State* v. *Pisee*, 8 Ariz. App. 430, 446 P.2d 940 (1968). In the case at bar two guns and a vial of Heroin clearly fall into this category. Items seized either actually or constructively by the Metro officers. For an example and discussion of constructive seizure see *United States* v. *Glossel*, 488 F.2d 143 (9th Cir. 1973).

Most of the other physical evidence in this case which came from defendant's apartment (spent casings and slugs, blood samples, fingerprints, measurements, photographs, etc.) was "seized" during a homocide-assault scene investigation. The Defendant states unequivocally that there is no such right to investigate a homocide scene. He tried to distinguish *State* v. *Duke*, 110 Ariz. 370, 518 P.2d 570 (1974) from the case at bar. He cannot escape, however, this language:

> "'. . . the traditional right of citizens to be free from unreasonable searches and seizures and unreasonable and unnecessary invasions of their privacy is not violated when the premises upon which a deceased victim is found are searched without a warrant.'"

This language, although quoted from an earlier reversed case, was held again in *Duke* to be the law in Arizona. *Sample* v. *Eyman*, 469 F.2d 819 (1972) is read by the

Arizona Court in *Duke* as requiring only that such a search begin "contemporaneously" with the discovery of the body and that police may not leave for two hours and then return to search. If *Duke* leaves any doubt certainly *State ex rel Berger* v. *Superior Court*, 110 Ariz. 281, 517 P.2d 1277 (1974) does not. The Court held there is a per curium opinion.

> "Where the police are called to the scene of a homicide, they may lawfully investigate such portions of the premises as are reasonably necessary to establish the true facts of the homicide.
>
> The order of the Superior Court suppressing the shell assertedly fired from the murder weapon is vacated." 110 Ariz. at 281, 517 P.2d at 1277.

Regardless of how one reads *Sample* v. *Eyman*, supra, the *Duke* case sets forth the Arizona Supreme Court's interpretation of the Fourth Amendment in this area. The Arizona Courts are not alone in holding that unhampered and immediate homicide scene investigations are reasonable under the Fourth Amendment. The defendant is wrong when he states that *Sample*, supra, is the first case in this area. His assertion that no other jurisdiction allows such warrantless scene investigations indicates a lack of research. In the six jurisdictions where the point has been squarly raised, the Courts have unanimously agreed with the Arizona Court. *Stevens* v. *State*, 443 P. 2d 600 (Alaska 1968); *State* v. *Chapman*, 250 A.2d 203 (Md. 1969); *State* v. *Oakes*, 276 A.2d 18 (Vt. 1971); *State* v. *Wallace*, 31 Cal.App.3d 865, 107 Cal.Rptr. 659 (1973); *Focher* v. *State*, 501 S.W.2d 1921 (Tex. 1973); *People* v. *Newlist*, 43 A.D.2d 150, 350 N.Y.Supp.2d 178 (1973).

As the New York Supreme Court appellate division stated in *Newlist*, supra:

> "Additionally, in dealing with a homicide the police should be accorded a greater leeway both in terms of the element of time and in the permissible scope of their investigation. In the context of this case, the police were not limited to an examination

and search of the immediate area where the body was found (i.e., the bedroom). On the contrary, they had the right, indeed the duty, to examine the "crime scene", which should be deemed to include the entire house. There was here no more than the "legitimate and restrained investigative conduct undertaken on the basis of ample factual justification" (Terry v. Ohio, 392 U.S. 1, 15, 88 S.Ct. 1868, 1876, 20 L.Ed.2d 889). Therefore, that branch of the order of the County Court which suppressed the items taken by the police after their return to the premises should be reversed and the defendant's motion in that respect denied." 350 N.Y. Supp.2d at 185.

The California Court of Appeals in a more lengthy discussion of the subject relied heavily on the Maine and Vermont cases cited above:

"On this appeal defendant argues that the trial court ought to have granted his motion to suppress the knife and the photographs taken by Officer Gray because the search of the kitchen was made without a warrant and was not justified under any of the recognized exceptions to the general rule prohibiting warrantless searches. Defendant's position is untenable.

. . .

The Supreme Judicial Court of Maine upheld the validity of the search and seizure, pointing out that when the police were confronted with circumstances suggestive of homicide, a duty immediately arose to make a thorough investigation to determine whether the decedent was the victim of foul play and if so, by whom and by what means. The court stated: "[W]hen the examination of the premises was resumed, it was but the continuation of a single investigation, a 'continuing series of events,' commenced with a lawful entry and pursued because of the exigency of circumstances. Although the police had from the beginning a reasonable basis for suspecting that a weapon had been used, the actual cause of

death and the element of criminal conduct could not be known or rise above the level of a rational possibility until the weapon was actually found at the termination of the investigation.

"There is no more serious offense than unlawful homicide. The interest of society in securing a determination as to whether or not a human life has been taken, and if so by whom and by what method, is great indeed and may in appropriate circumstances rise above the interest of an individual in being protected from governmental intrustion upon his privacy. In our view this is such a case. We see here no more than the 'legitimate and restrained investigative conduct undertaken on the basis of ample factual justification' which is not proscribed by the Fourth Amendment. Terry v. State of Ohio, supra (1968) [392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889]. The public had a right to expect and demand that the police would conduct a prompt and diligent investigation of these premises to ascertain the cause of this apparently violent death and to solve any crime committed in the course thereof." (pp. 210-211 of 250 A.2d.)

In State v. Oakes, supra, the Vermont Supreme Court, in upholding a search for and seizure of the murder weapon in a homicide case, observed that "The role of the police officer carries with it the duty and responsibility to carry out such an investigation upon the discovery of what appears to be a crime. Once authorizedly on the scene, enforcement officers are under a duty to complete their investigation of the occurrence. Here, even if their original entry had been obstructed rather than solicited, the emergency situation called to their attention would have justified a warrantless entry and investigation of the scene as a part of their authorized duty. [Citations.]" (p. 25 of 276 A.2d.)" *People* v. *Wallace*, supra, 107 Cal.Rptr. at 660, 661, 662.

It appears from these cases and those relied on therein that the great weight of authority holds that warrantless

homicide crime scene investigations, including a search of the premises, the taken of photographs and fingerprints, etc., are to be upheld as reasonable under the Fourth Amendment.

Respectfully submitted this 28th day of January, 1975.

DENNIS DECONCINI
Pima County Attorney

/s/ James M. Howard
JAMES M. HOWARD
Deputy County Attorney

[Certificate of Service Omitted in Printing]

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA, COUNTY OF PIMA

EXCERPTS FROM HEARING ON MOTION TO SUPPRESS—January 31, 1975

TESTIMONY OF BRICE FULLER

[136] DIRECT EXAMINATION

BY MR. OSERAN:

Q Could you state your name for the record, sir?
A Brice Fuller.
Q And how are you employed, Mr. Fuller?
A I am a Lieutenant on the Tucson Police Department.
Q And what is your function as a Lieutenant on the Tucson Police Department?
A I am presently assigned to the uniformed division as a team commander.
Q What was your function on the 28th of October 1974?
A At that time, I was assigned to the Metropolitan Area Narcotics Squad as the commander.
Q And drawing your attention to the afternoon hours of that day, were you at the Colony Apartments on Eighth Street?
A Yes, sir.
Q And what was your purpose in being there?
A We were participating in an investigation of a narcotics case.
Q And was your purpose to in fact effect a buy and then a bust, immediately following of the seller of that narcotics, if in fact the buy [137] was successful?
A Essentially, we had no intention of completing the buy.
Q Then, in fact you went up there for an attempted buy and then a bust situation?
A Yes, sir, we used the ruse of making a buy to determine whether or not the individual did have narcotics.

Q I see, so in other words, at the time you first went to the Colony, you didn't have what is considered to be probable cause to obtain a search warrant, to execute a search of that particular apartment?

A That is correct.

Q So you were in fact, using the ruse of a buy, trying to ascertain that, in fact, the person of apartment 211 at the Colony Apartments had some contraband?

A Yes, sir.

Q And how many other officers participated in the incident of October 28th?

A I believe there were ten officers, total.

Q And was there also, would that be including a County Attorney?

A And one County Attorney.

[138] Q And what was his function?

A He was along as an observer.

Q Did he advise you at any time in regard to your operation of the buy or the bust?

A No.

Q Did there come a time when it was ascertained that in fact, that you in fact had reason to believe that there was contraband in apartment number 211?

A Yes, sir.

Q And were all of the officers involved in this operation in plain clothes?

A Yes, sir.

Q And did some of the officers wear their hair in a longer manner, as would an undercover officer, it would be customary for an undercover narcotics buyer to wear his hair length and clothes? Am I clear or are you confused as I am?

A Most of the officers attempted to dress in a manner similar to the norm for the type of people that they deal with.

Q Which in fact would be a disguise? Some of the officers at least were then disguised so as not to look like police officers?

A A disguise to me means mask or false mustache or things of that nature. They dressed [139] casually, they wear their hair in common, the way it is worn today by a great number of people, yours included.

Q So in other words, they dressed so as they would not look like a police officer might look to carry out their functions?

A Okay, yes.

Q And were all these officers members of the Metro?

A Yes, sir.

Q And could you explain what is meant by Metro?

A Yes, sir, they are members of Metro. The Metropolitan Area Narcotics Squad is a unit consisting of members of the Tucson Police Department, South Tucson Police Department and Pima County Sheriff's Office. It was formed in, I believe, September of 1970, with the intention of providing a unit that could operate to investigate narcotics cases any case within the County.

Q And to make purchases of narcotics and to arrest people involved with narcotics, is that not right?

A Yes, sir.

Q And was Officer Barry Headricks with you on that day?

[140] A Yes, sir.

Q And could you describe his appearance, please?

A The reason, what happened or his physical appearance?

Q Physical appearance, how he was dressed?

A He was wearing, I believe, a blue shirt, a blue levi jacket, blue levis and boots.

Q Cowboy boots or do you recall?

A I don't think they are really cowboy boots, they are more of a round toed casual boot, I believe they were roughout type boots, but I'm not sure.

Q And how was Agent Headricks wearing his hair?

A It was long, a little bit longer than mine, I would say down probably to the bottom of his ears and maybe a little longer in the back.

Q Did he have any facial hair?

A I believe he had a very faint mustache.

Q Did you learn, well, did Officer Headricks at approximately 2:00 o'clock that afternoon or sometime thereafter, gain entry into apartment 211?

A Yes, sir.

Q Did he then come out of that apartment [141] and advise you or other officers, information that he then had, as a result of being in apartment 211?

A Yes, sir.

Q And did you then give an order for the officers to converge on apartment 211?

A Yes, sir.

Q And did you discuss previously at any time your plan in gaining entry into that apartment?

A Yes, sir.

Q And what was that plan?

A At the time that Officer Headricks initially entered the apartment, he was to indicate to the occupants that he was interested in purchasing some narcotics and that a second person was waiting for him down in his automobile, holding the money at that location.

Then, if there were in fact narcotics, he would come down and come back to the apartment, supposedly returning with the money, and, in fact, then when he returned to the apartment and was readmitted, we would enter at this time and make the arrest.

Q I see. So, the plan in effect would be that he would knock at the door, the door would be opened or through any other means, the occupants [142] of the apartment would see that it was Officer Headricks, who they believed to be a buyer of narcotics, and would open the door and allow him to enter into the apartment?

A Yes, sir.

Q And did he in fact knock on the door?

A Yes, sir.

Q And was the apartment opened to allow him to enter?

A Yes, sir.

Q And shortly thereafter or immediately thereafter, was there an attempt made to close the apartment door?

A Yes, sir.

Q And did the other officers then force entry into the apartment?

A Yes, sir.

Q Were you able, were you at the or near the entry to apartment 211?

A Yes, sir.

Q Where were you, do you understand this diagram up here (indicating)?

A Yes, sir, the ones with the numbers.

Q Okay, you take this representation to mean this in fact was apartment 211?

A Do you want to put a compass on there or [143] does it matter?

Q I don't think it really matters, let's say this (indicating) is south and this (indicating) is north?

A In that case—

Q Can you use this pointer and give us your location at the time Sergeant Headricks knocked at the door?

A Right here (indicating).

Q And were any other officers standing between you and Officer Headricks?

A No, Officer Headricks was directly in front of the door and Officer Schwarz, was to his left—

Q Was he making any attempt to conceal himself?

A Not really, he would have been expected back, he would have been the expected person.

Q And where were the other officers?

A Sergeant Wolfe and Mr. Cochran, from the County Attorney's Office, were here (indicating). I don't know in what order in the hall, but the other officers, Morgan and I, and Skuta—

Q Were all on this side?

A On this side (indicating).

Q And we are talking about the east side?

[144] A Yes.

Q And were you and officer Schwarz the only—let me ask you this, were you able to observe and did you observe the doorway at the time Officer Headricks knocked on the door?

A Yes, sir.

Q Okay, and would Officer Schwarz be able to observe the doorway and the door when Officer Headricks knocked on the door?

A Yes.

Q And would any other officer be able to make this observation?

A No.

Q Did Officer Headricks knock in a loud fashion or soft fashion or just a normal sort of a knock?
A I would call it a normal knock.
Q And you could hear that knock, couldn't you?
A Yes, sir.
Q Or do you recall whether or not you in fact heard it?
A I think that I did.
Q It was not a loud knock?
A No, he didn't pound on the door or anything, just knocked.
[145] Q And how long or how much time elapsed from the time he knocked until the door was opened to you?
A I suppose it was just a matter of seconds. There wasn't any undue delay.
Q And did Officer Headricks or Officer Schwarz say anything between the time Officer Headricks knocked and the time the door was in fact opened?
A No, sir.
Q Did you, from the point that Officer Headricks knocked, did you hear Officer Headricks say anything?
A I'm sorry, would you repeat?
Q From the point that Officer Headricks knocked on the door, forward in time, did you hear him say anything?
A No, sir.
Q After Officer Headricks gained entry into the apartment and after it became necessary to force the door open, who next obtained or gained entry into the apartment, what officer?
A Are you referring to who passed the bottleneck of the doorway itself?
Q Yes.
A I would be the second officer.
[146] Q And what was causing the bottleneck?
A The individual who opened the door, immediately tried to close it again and the bottleneck was formed by his pushing to try to shut it and us pushing to try to open it.

Q And did you go over or around the bottleneck?
A Kind of a little of both, I think.
Q And who was causing the bottleneck at the point, who in fact did you go over or around?
A It would be Detective Schwarz.
Q And the person that had opened the door?
A Well, he was behind the door. I don't think he had any contact with him at all, but I went.
Q You just slipped in through, as he was forcing the door open?
A Yes, sir.
Q And did you see who followed you in through the door?
A No, sir.
Q Did you have your weapon in your hand, Officer Fuller?
A Yes, sir.

• • • •

[149] Q Let me jump ahead, I don't think that this testimony is particular relevant to this time. After the shooting had stopped, did you then secure the people in the bedroom and people in the living room?
A Yes, sir.
[150] Q And did you then secure everything the way it was at that point in time, until other officers came to the—
A Yes, sir, at that time, I just announced, when I was sure that everybody was secured and that there was ambulance and rescue units on the way, I just announced that no one was to do anything until we were relieved.
Q Is the reason for that, that you do not investigate your own actions when a shooting has transpired?
A Yes, sir.
Q So in fact, you had observed the weapon in the bedroom, had you not?
A Yes, sir.
Q And you didn't even pick that weapon up, is that correct, sir?
A I didn't, no sir.

Q You just stopped your total operation until the people that would handle it would show up, is that correct, sir?

A Yes, sir.

Q And who were the people that showed up, that you turned your scene over to?

A That I can recall, Lt. Ronstadt of the uniformed division arrived, Captain Holdcroft [151] was there, Major Dupnik was there, Detective Reyna arrived and many other officers. Specifically, I gave the scene to Lt. Ronstadt.

Q At the time of the arrival of the other officers or shortly thereafter, were the wounded persons in the apartment transported to the hospital?

A Yes, sir.

Q Was it just about the time the other officers arrived or—

A Yes, sir, as you can imagine, it was very confusing and the rescue people, and I believe the ambulance people did get there first. But, the other officers were arriving at the same time that they were starting to move. I think before they moved the first wounded person out.

Q So within a matter of moments, after the other officers arrived, the wounded people were moved from the apartment to the hospital?

A Yes, sir.

Q And was one of those wounded people Officer Barry Headricks?

A Yes, sir.

• • • •

[152] Q You did, did you not, sir, have the apartment secured from the point the shooting was finished until the point the other officers and the medical people arrived?

A Yes, sir.

Q And did you learn that approximately one hour after the removal of Officer Headricks, that he in fact expired at the University Medical Center?

A Yes, sir.

• • • •

[153] Q The search of the apartment subsequent, the subsequent search of the apartment did not take place by either yourself or any members of the Metropolitan Area Narcotics Squad that had initially gained entry to make the arrest, is that correct, sir?

A That is correct.

Q The search would have been performed by the homicide detail or the officers to which you turned the scene over to, is that correct?

A Yes, sir.

Q Did you at any time or did anybody, to your knowledge, at any time secure a telephonic or otherwise search warrant?

A For—

Q For anything?

A I didn't and I believe that someone did.

Q There was in fact a telephonic search warrant secured to search a car in the parking area, is that correct, sir?

[154] A I have no personal knowledge of that at all.

Q So you don't know whether or not anybody secured a search warrant and you don't know what, if anybody did secure a search warrant, what in fact it was for, for what area it was for?

A No, sir, not directly. Like I say, I have heard talk, but I was not involved.

Q You yourself have never seen any search warrant?

A No, sir.

Q For the premises?

A No, sir.

Q Where were you when you learned that Officer Headricks had in fact expired?

A In the apartment.

Q And was the homicide detail searching the apartment at that time or had control of the apartment at that time?

A They had control. I don't know what specifically they were doing.

• • • •

[168] CROSS-EXAMINATION

Q Okay, what, if anything, do you recall [169] hearing during this period of time, from the time that the door was knocked on, until you made entry through the door into the apartment?

A I didn't hear a thing that I can recall.

* * * *

[170] Q Did you or any of the Metro officers, to your knowledge, seize anything from the apartment other than making an arrest of the injured subject and those subjects that weren't injured?

A To my knowledge, we did not seize anything.

* * * *

[177] REDIRECT EXAMINATION

Q How long, generally, does it take to obtain a telephonic search warrant?

THE COURT: That would depend on a lot of things.

MR. OSERAN: If it is done in a normal working day?

THE WITNESS: Well, at what point do you want to start? At the point that we would begin collecting information?

MR. OSERAN: No, at the point you had the information and were attempting to secure the warrant?

THE WITNESS: Then it would depend on—

MR. OSERAN: Availability of a judge?

THE WITNESS: First, yes.

MR. OSERAN: Assuming that you could immediately contact a magistrate—

MR. HOWARD: I would object to the assumptions.

THE COURT: Sustained.

MR. HOWARD: And to the form of the [178] question.

BY MR. OSERAN:

Q Could it be done within a matter of minutes?

A No, sir, it is almost impossible to get a telephonic search warrant during a working day.

Q Because the magistrates are—

A On the bench.

Q What about during the evening hours or on weekends or holidays, is it easier then?

A Once we have gotten one tracked down, but that sometimes, finding the judge, physically locating him, is a problem.

* * * *

IN THE SUPERIOR COURT OF THE
STATE OF ARIZONA, COUNTY OF PIMA

EXCERPTS FROM HEARING ON
MOTIONS TO SUPPRESS--February 3 and 4, 1975

TESTIMONY OF MORRIS REYNA, JR.

* * * *

[105] MORRIS REYNA, JR.

called by Mr. Howard, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. HOWARD:

Q State your full name and occupation, for the record, please.

A Morris Reyna, Jr., detective with the homicide detail, Tucson Police Department.

Q Calling your attention to the 28th day of October, 1974, did you become involved in an investigation of a homicide in the afternoon of that day?

A Yes, sir, I did.

Q And did you have occasion to go to The Colony apartments in the course of that investigation?

A Yes, sir.

Q What time was it when you arrived at [106] The Colony apartments?

A About 3:28, 3:30.

Q What was the occasion for your arrival there; what had you heard or what brought you to that location?

A Through radio traffic I had ascertained that a shooting had occurred and a police officer had been shot, as other people had, and in response to that situation, we went to investigate the shooting.

Q You say "we." Who else arrived there?

A Detective Larry Hust, Detective Victor Marmion, Sergeant Bunting, and other detectives.

Q Did you arrive with one of these other officers?

A I arrived simultaneously in a different vehicle. We were all driving separate vehicles.

Q What did you do when you arrived?

A I contacted Lieutenant Fuller and was briefed as to what had transpired. I relieved one of the Metro agents who was in the bedroom at that location watching over a subject, and essentially secured the scene and proceeded with the scene investigation.

Q When you say you relieved one of the agents, in what room in the apartment was this [107] agent?

A He was in the bedroom. There is only one bedroom in that apartment.

Q What was he engaged in doing at that time?

A He was engaged in watching over Mr. Mincey who was laying on the floor directly below or in front of him.

Q Then what did you do from that point forward?

A I tried to make sure that the subjects, three subjects I saw in the room that were shot were taken care of and removed, and after the subjects were removed and during the course of their removal I tried to ascertain to make sure that no evidence was destroyed and nothing other than what was absolutely necessary be touched or moved.

Q Did you have a conversation with Detective Sergeant Bunting shortly after your arrival at the apartment?

A Yes, sir.

Q And did he make, did he assign particular duties to you?

A Yes. He assigned the scene investigation to me.

[108] MR. HOWARD: Can I have this marked as State's Exhibit 1?

THE COURT: Yes.

Q Can you draw a diagram of the apartment on what has been marked as State's Exhibit 1, not necessarily to scale, but just showing the rooms and their relationships to one another.

A Yes.

Q Including the front door.
A This is an approximation of the general idea of the apartment, the Colony apartments. The living room, bedroom, closet, bathroom, kitchen and the front door.
Q You can have a seat now. There is another door here to the next-door apartment, is that correct, on this wall?
A Yes, sir.
Q Where you have indicated kitchen and bathroom, are these cupboards you have built in here?
A Yes.
Q This whole area is the kitchen?
A Yes.
Q And this area is the bathroom?
A Yes.

• • • •

[109] Q When you arrived at that apartment, or when you arrived at the Colony apartments, did you see Officer Barry Headricks?
A I observed him being loaded into the ambulance, which would be in the south parking lot of The Colony apartments.

• • • •

[110] Q After you had the conversation with Detective Sergeant Bunting, what did you do?
A I secured the scene and removed and [111] insured that everyone other than uniformed officers, I.D. techs and laboratory personnel were out of the scene, and proceeded to record photographically everything we could in the apartment.

• • • •

Q What procedure did you take once you cleared the apartment of the personnel other than the I.D. techs and lab personnel you needed present?
[112] A What did I do after that?
Q Yes.
A I insured the scene would be accurately measured and proceeded with the plotting of evidence, searching the room for anything of evidentiary nature, and in short,

tried to insure that everything possible could be done to make sure we had all the evidence, everything photographed, diagramed and accurately recorded.
Q Who aided you in the measuring procedure and seizing evidence from the apartment?
A Officer Lynch, Agent Lepird from the Sheriff's Office, Mr. Condron.
Q Who is Mr. Condron?
A Mr. Condron is a police illustrator, a man I utilize for crime scenes reproductions, and then the I.D. technician. We all worked together under my instructions.
Q At the time that this happened, had the injured persons, three injured persons, Mr. Mincey, Debra Johnson and Mr. Ferguson, were they removed from the apartment?
A Yes. As soon as we could, we removed them to get medical assistance.
Q And how about the two arrested subjects, Miss Greenwalt and Mr. Hodgeman?
[113] A Yes. They were removed as soon as feasible in order to remove them from the scene.
Q Had you started your crime scene investigation even before they left the scene?
A Yes, essentially.
Q How did you proceed with the aid of Officer Lynch and Deputy Lepird to search and investigate within the apartment?
A I attempted to make sure that everything had been photographed in this place and tagged and left marked where it was found in order to obtain the measurements accurately. We took it systematically, going in one room at a time going in a counter-clockwise or clockwise direction. [114] I had agent Lepird standing by to watch the whole proceedings to make sure I did not forget anything, and this is what he was utilized for, in assistance in measurements at different angles of photography.
Q Which room did you start in, do you recall?
A We started the photography in the living room and terminated in the bedroom. We started the crime scene search where we started actually picking items up and

bagging them, in the bedroom; however, I had essentially when searching the room upon my arrival.

Q Can you tell what type of things you looked for?

A I was looking for narcotics paraphenalia, since it had been allegedly been a result of a narcotics transaction.

Q Let me start at the beginning. What had you been told by Lieutenant Fuller about what had occurred in the apartment?

MR. OSERAN: I object on relevancy. As far as this Officer is concerned in what his state of mind is is really not important. His actions are relevant and material to what he is testifying to.

• • • •

[119] Q What narcotics generally, what narcotics, narcotics paraphenalia did you find during the course of your investigation?

A I found a syringe; some cocaine in a little bottle; some heroin, and a shirt in which I found some identification of Mr. Mincey; in a bottle in the bathroom something —, in a bottle on top of a plate, paraphenalia here; some surgical tubing in here, which from my experience has been used to tie off or cause veins to pop up for easier injection; and some heroin in a small foil package here; some other items I can't recall.

Q Did you seize those items either narcotics or narcotics parphenalia?

A Yes, I did.

Q Did you take also samples of various fabrics in the apartment which carried blood stains?

A Yes, sir, I did.

Q The shirt you mentioned with heroin in it, where was it?

A It was hanging on a chair right in that area in the bedroom.

Q And what else was in that jacket—[120] what kind of jacket was it?

A It was a military fatigue jacket. The sleeves had been cut off. In that jacket or shirt was identification be-

longing to Mr. Mincey, and in the same pocket was some heroin and money in a little plastic bag, and a small metal tube.

• • • •

[126] Q To your knowledge was anything seized at the scene, or was any search performed by Agents of the metropolitan area narcotics squad or Tucson Police Officers assigned to that squad?

A To my knowledge, there was no search or seizure by any of those agents.

• • • •

CROSS-EXAMINATION

[140] Q How did you first hear that Officer Headricks had expired at the University Medical Center; who contacted you?

A Sergeant Larry Bunting told me that Barry had died about—

Q Excuse me. How did he contact you?

A He spoke to me in person.

Q Was he at the apartment at that time while you were conducting your investigation, or did he come to the apartment?

A He came to the apartment.

Q To advise you that Officer Headricks had expired?

A I don't know if it was specifically for [141] that or to ascertain something during the investigation, which frequently you converse with other investigators to determine and correlate information.

Q At the point in time he came to the apartment to talk with you, who else was present in the apartment with you? Was Officer Lynch there?

A Officer Lynch, Bill Condron, I.D. Technicians and Agent Lepird.

Q How long did the entire crime scene investigation take; how many days did you spend in the apartment?

A Initially I worked on it that night until I was just exhausted, and then I returned the following day continuing with the investigation, I did work up until, the last time I was in the apartment, possibly a month ago.

Q Approximately three or four days initially?
A The initial investigation, yes.
Q Did you inventory all the items in the apartment in your investigation?
A Pardon?
Q Did you inventory every item contained in the apartment during your investigation?
[142] A Eventually the contents of the apartment were removed, inventoried, yes.
Q Did you ever secure a search warrant?
A I did not.
MR. OSERAN: I don't have any further questions.

REDIRECT EXAMINATION

BY MR. HOWARD:

Q On the 28th and into the early morning hours of the 29th, when did you terminate your investigation, the evening of the 28th or the morning of the 29th?
A I don't recall what time. I continued until I was very, very tired and didn't feel I could function properly.
Q Approximately when was that; was that the early morning hours of the 29th?
A Yes, the early morning hours of the 29th.
Q What did you do at that point?
A I proceeded down to the police station with Officer Lynch explaining to him how to handle the items we had taken under my direction, and made some notes concerning what I had done, which were later reduced to a report, and I went [143] home.
Q What did you do at the apartment when you left the early morning hours of the 29th?
A I had caused to have some uniformed officers there to secure the apartment, stayed in the apartment and keep it from being entered by anyone and to keep it in police custody so I could continue my investigation.
Q Somebody was there, you posted somebody there and they stayed there until you returned?
A There were officers there 24 hours until we terminated the investigation.

Q During the first segment of your investigation—strike that. What items were seized after that first segment of your investigation; what items were taken from the apartment after that first segment of your investigation?
MR. OSERAN: Are we talking about the first segment, the initial three or four times?
MR. HOWARD: We are talking up until he left the apartment in the early morning hours of the 29th, as the first segment.
A Okay, and the question was what?
Q What items were received after that?
A I received since I lacked adequate tools to do so, I had to make a hole in the concrete [144] wall to obtain bullet fragments. I had the crime lab personnel, which did not conduct tests for me initially, take items that were unavailable. The scene was essentially kept that way until I was able to reconstruct what had transpired.
Q During the first segment of the investigation were measurements taken?
A Yes sir.

* * * *

[147] RECROSS-EXAMINATION

BY MR. OSERAN:

Q How many hours did you spend in the apartment on the 28th?
[148] A On the 28th, until midnight.
Q Nine hours?
A From my arrival at 3:28 until midnight.
Q Did you virtually search and look into every room and every drawer and every cupboard in the apartment?
A That portion I accomplished before the 28th expired, yes.
Q What you couldn't accomplish you finished in the next four days?
A I finished running into the next morning until I was very, very tired and I didn't feel I was functioning at my best.

Q Did you take anything from the apartment on the 28th?

A Well, it was seized. It may not have been removed.

Q Did you remove anything from the apartment on the 28th?

MR. HOWARD: Are we talking about the 28th?

MR. OSERAN: And the early morning hours of the 29th?

A I was restricting myself from previous contact with attorneys. The 28th and 29th, items were removed from the apartment, yes, to be used [149] in the investigation as possible evidence of the crime and the transaction that was to transpire.

Q When?

A Sometime in the early morning hours of the 29th, the following day, the 29th.

Q You mean the following day or do you mean 12:00 to 1:00 in the morning?

A Some items were removed that night and some other items were removed the following day.

• • • •

[150] THE COURT: When did you find and remove the narcotics?

A The narcotics were found during the 28th and the 29th initial investigation. They were removed on our leaving on the 29th when I followed Officer Lynch to the station and instructed him how I wished the items placed in property.

REDIRECT EXAMINATION

BY MR. HOWARD:

Q Would those items appear on property control sheets as being received as property from Officer Lynch, number 8677, on the early morning hours of the 29th of October, be the items you are referring to as removed from the apartment either the late night of the 28th or the early morning hours of the 29th?

A Yes.

MR. HOWARD: No further questions.

RECROSS-EXAMINATION

BY MR. OSERAN:

Q You were advised by Officer Fuller that all the shooting took place in the bedroom, were you not?

[151] A Yes. I was advised the shooting emanated in the bedroom and come out through the walls.

Q The bullets came out through the walls but all the shooting in fact took place in the bedroom is that correct?

A Yes, the shooting itself.

Q And at the time you first arrived and observed Mr. Mincey, can you describe what position he was in?

A He was laying on his back with his hands along the side occasionally looking at me and closing his eyes.

Q Was he unconscious for some period of time?

A He was intermittently unconscious and would regain consciousness.

Q Had he sustained a gunshot wound?

A He had.

MR. OSERAN: No further questions.

MR. HOWARD: Nothing further. May this witness be excused?

THE COURT: Yes. You may step down and you may be excused.

• • • •

TESTIMONY OF DETECTIVE HUST

DIRECT EXAMINATION

• • • •

[153] Q And then where did you go?

A To the Arizona Medical Center.

Q And who else, what other officer—strike that. Was Officer Schwarz also at the Arizona Medical Center?

A He was there when I arrived, yes.

Q Were you given an office which you could use as a command post or just a point you could be reached while at the Arizona Medical Center?

A Yes.

Q Did the office have a telephone?
A A telephone, yes.
Q Was Detective Schwarz in the office?
A Yes.
Q And were you advised that Officer Headricks was in the emergency room at that time?
A Yes.
Q And were you shortly thereafter advised that other wounded individuals, perhaps suspects in this matter, were also arriving at the hospital?
A Yes.
Q Did you ask Detective Schwarz to get some uniformed personnel to help guard the suspects [154] that were arriving?
A Yes.
Q And a short time thereafter were you advised that Officer Headricks had expired in the emergency room?
A Yes.
Q Who advised you of that?
A The coordinator of the emergency room.
Q What did you do when you heard that?
A I advised Detective Schwarz to notify the station. I also notified Sergeant Bunting by radio.
Q Was Sergeant Bunting aware of the information prior to your notification?
A I don't know if he was or not.
Q You don't recall, or do you—how long after you learned that Officer Headricks expired did you contact Sergeant Bunting?
A I believe I got hold of him within a few minutes.
Q To the best of your knowledge this was the initial point in time he learned Officer Headricks had expired is that correct?
A To the best of my knowledge, yes.
Q Were you then contacted by Office personnel to do something in regard to the suspects?
[155] A What office personnel?
Q Nurses.
A The nurse, yes. I was requested to remove handcuffs from the individuals that were brought in.

Q Did you remove handcuffs from the man who you now know to be Rufus Mincey sitting to my right?
A I believe I did, yes.
Q You don't specifically recall if you did or not?
A Not specifically.
Q Do you recall when it was the first time that you,—The exact language when you raised Sergeant Bunting on the air and advised him that Officer Headricks had expired, was the language used that "We have a homicide"?
A Yes.
Q What did he say when you told him you had a homicide?
A Probably "ten four."
Q That is all you recall?
A Right.
Q When is the first time you recall seeing or coming in contact with Mr. Mincey?
A I recall seeing him in the emergency [156] room. I believe he was in the hall being cared for by doctors and nurses.
Q This is prior to the time you removed his handcuffs?
A No. I believe it would have been afterwards.
Q Do you recall on what he was laying, a stretcher or bed, wheelbed?
A On a wheelbed-type emergency.
Q In what position was he lying?
A On his back, I believe.
Q Did you see his face, or do you recall?
A I don't recall if I could or not.
Q Was he being fed intravenously at that time?
A I don't recall if he was or not at that time.
Q Were doctors and nurses working on him?
A There were doctors and nurses all over the emergency room and around all the patients.
Q Did you have the opportunity to come in contact with Mr. Mincey after he was taken from the emergency room?
A Yes. Later that evening I did.
[157] Q How much later was that?
A Probably three or four hours later.

Q Do you believe it was three to four hours later?
A Yes.
Q And in what unit of the hospital did you have contact with Mr. Mincey?
A The intensive care unit.
Q When you entered the intensive care unit, who was present in that area in which Mr. Mincey was?
A There were several nurses and doctors in the area.
Q And do you recall specifically who was present at the bedside of Mr. Mincey?
A On that day?
Q At that time.
A I believe his assigned nurse was Elizabeth Graham.
Q Can you describe where Mr. Mincey was and what he was doing and what was being done to him in the intensive care unit?
A He was in one of the intensive care rooms being fed intravenously. He had a tube down his throat.
Q When you say "had intravenously" do [158] you mean there were bottles suspended and needles going into his arms?
A Yes, that's right.
Q Were there any tubes in any other parts of his body?
A I believe he had a tube in his throat, down his throat.
Q Do you know what the purpose of that tube was?
A I could only guess. I don't know for sure.
Q Did you later learn it was to enable him to breath?
A That was my understanding, yes.
Q And when you entered the room were his eyes open or closed?
A I don't recall if they were open or closed.
Q Was your reason for entering the room to interrogate Mr. Mincey if possible?
A To interview him, yes.
Q And did you in fact interview Mr. Mincey?
A Yes.
Q And did you ask him questions?
A Yes.

[159] Q Did you record the questions you asked him?
A No.
Q Did you take notes in regard to the questions that you asked him?
A Not right at that point, no.
Q What time did you first record the questions?
A I believe later that evening I jotted some information down, and the following day.
Q Do you recall what time on that evening?
A No, not the exact time.
Q And do you have copies of those notes that you took?
A Yes.
Q Do you have those copies with you?
A All the notes that I took?
Q Yes.
A I don't know if I do or not. They may be in the case file.
Q Are copies of those notes still available?
A I don't know if they are in there or not.
MR. OSERAN: If they are available, Your Honor, I would ask they be provided to the [160] Court pursuant to my motion for disclosure. I originally asked for that material and the Court ordered it would be provided to me regardless of the circumstances.
THE COURT: Very well. If they are available, I will ask you to furnish them for him.
Q (By Mr. Oseran) And did you ask Mr. Mincey questions verbally?
A Yes.
Q Did he respond verbally?
A No.
Q Why did he not respond verbally?
A He had a tube in his throat and he couldn't talk.
Q How did he respond?
A He wrote notes back.
Q In preparing and taking notes in regard to the questions you asked, did you have the answers available to you that had been written out by Mr. Mincey?
A Yes.

Q And with those answers you attempted to reconstruct what his questions had been is that correct?

A Yes.

Q In your police report when you show [161] questions and answers, questions and answers, these answers are, in fact, accurate, that the questions were written down by you at a later time to the best of your memory as to what your original questions had been; is that correct?

A As accurate as I could, yes.

Q Do you have the copies, the original copies of the statements whether unculpatory or exculpatory written by Mr. Mincey?

A Yes.

Q Do you have those on you?

(The witness hands paper to counsel.)

Q What kind of paper are the statements written on?

A That was paper supplied by the hospital.

Q Are some of the statements in handwriting and some statements in printing?

A Yes, I believe they are.

Q But they are all the statements of Mr. Mincey?

A Yes.

Q When you first approached Mr. Mincey, isn't it true that you awoke him, or somebody else awoke him from sleep?

A I don't recall that, if I woke him or [162] somebody else woke him or he was awake when I walked in.

Q Isn't it also true that you originally did not advise Mr. Mincey of your true purpose for being present at that time?

A You mean when I immediately started talking to him?

Q Yes.

A No.

Q And the first question you asked him dealt with one of the other subjects that had been wounded; is that correct?

A Yes.

Q And some of the information you were eliciting from Mr. Mincey at that time was already information known to you, was it not, in regard to Chuck being from the fair, these sort of things?

A No. I did not have any knowledge of that when I questioned him.

Q Did you go to his room specifically to interview him and his involvement in regard to the shooting?

A Along with attempting to obtain information about Mr. Ferguson, yes.

Q At what point did you advise him of his [163] constitutional rights?

A When I stopped questioning him about Mr. Ferguson, as far as his name and where he lives and everything, and it turned into an interview type situation.

Q I am going to read to you the answers of Mr. Mincey. Will you try to describe to the best of your knowledge at this time the question that you asked him in order to elicit these responses:

"I remember somebody standing over me saying, 'move nigger, move.' I was on the floor beside the bed."

A I probably asked him to the effect, "what happened?"

Q And your second question, this would be the answer to your second question:

"This is all I can say without a lawyer."

THE COURT: Excuse me one moment.

Q And the second response from Mr. Mincey was, "this is all I can say without a lawyer." Do you recall what the question was?

A Not right off hand, no.

Q And the third response by Mr. Mincey was: "I am going to have to put my head together. [164] There are so many things that I don't remember."

Do you recall what the question was?

A Probably something in regard to the shooting.

Q And the next response, there are three responses in a row, "police? Do you mean did he give me some money? No. What do you call a sample. I can't say without a lawyer."

Do you recall what your questions were?

A I believe there was something, "Who came into your apartment?" Read the last two again.

Q "Do you mean, did he give me some money. No. What do you call a sample?"

A That would be some type of question to the effect of "Did you sell any narcotics and did you give out any type of sample or did anyone sample anything."

Q And he advised you he couldn't say without a lawyer. You remember the next response, "Let me get myself together first. You see, I am not for sure. Everything happened so fast I can't answer at this time because I don't think so, but I can't say for sure. Some questions aren't clear to me at the present time." Then you recall immediately under that, "This [165] writing was used as a means of talking because I could not talk at the time of the interview."

A Yes. I probably asked him to sign that to show that it was voluntarily given.

Q And do you recall the next answer after that, "if it is possible to get a lawyer now we can finish the talk. He could direct me in the right direction whereas without a lawyer I might say something thinking it means something else. Is is still inside me? My right leg. I can't use it. I can't even move it. The pain is unbearable. I will helf you if I can and everybody possible. My name is Sergeant," and struck, "Rufus J. Mincey," and his address. Do you recall what your question was in regard to that answer?

A Not right off hand, no.

Q Did you ever stop questioning Mr. Mincey when he asked for an attorney?

A I believe I advised him if he wanted an attorney I could no longer talk to him. Also that he had the right to refuse to answer any question he wished to.

Q Did he ever report his responses to that question anywhere in his statement, that he wished to began talking to you?

[166] A No, I don't believe so. I believe it was with an affirmative nod of the head.

Q My question was: Did you ever stop talking to Mr. Mincey after your second question when he responded, "this is all I can say without a lawyer."

A Did I ever stop talking?

Q Did your questioning cease at that time?

A Apparently not. There are some more answers there.

Q Are these five pages all the pages and all the responses that were elicited from the defendant Mr. Mincey?

A That I took, yes.

Q Did anybody else take any statements from Mr. Mincey inculpatory or exculpatory at that time or any other time?

A Not to my knowledge.

Q During the course of time you were in the room other than hearing Mr. Mincey's response that he was in unbearable pain, did you learn that he was uncomfortable at that time in any other way? In other words, let me phrase it this way: do you recall Mr. Mincey advising the nurse that he was very cold, by writing or by his motion, and to put covers over his body?

[167] A I believe something was done and he had his feet covered. I don't recall what response he made.

Q Is it true that altogether in the five pages of written statements, that he advised you seven time that he wanted an attorney?

A I don't know how many times he advised me.

Q Is it true that he repeatedly advised you he was confused at the present time at to the facts of the incident?

A Yes. He did advise me of that.

Q And it is true also, is it not, that he did complain of pain, unbearable pain, on at least two occassions, would you say?

A I recall one occasion. It is possible he did on two.

MR. OSERAN: No further questions.

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CROSS EXAMINATION

[169] Q When you completed asking those questions about Chuck Ferguson, what did you do?

A I advised him of his constitutional rights; also the fact that he was under arrest for the murder of a police officer.

Q When you advised him of his rights, how did you do that?

A By the little Miranda card.

Q Do you have that card with you today?

A Yes.

Q Will you read it now as you read it then for Mr. Mincey.

A You have the right to remain silent. Anything you say can and will be used against you in a Court of law. You have the right to the presence of an attorney to assist you prior to questioning if you so desire. If you cannot afford an attorney, you have the right to have an attorney appointed for you prior to questioning. Do you understand these rights—his response was an affirmative head shake—now having been advised of these rights and understanding these [170] rights, will you answer my questions?—Again being another affirmative head shake.

Q Did you proceed to question him concerning the events of the afternoon of the 28th, October, 1974?

A Yes.

Q And he responded by writing answers in most cases, is that true, on hospital forms or hospital paper provided?

A Yes.

Q Had you received permission prior to talking to him, from hospital personnel?

A Yes.

Q From whom?

A I believe I talked with Dr. Farrel, and again the nurses checked with somebody to get it authorized.

Q Did Mr. Mincey appear to be under the influence of any drugs at the time you talked to him?

A Not that I could detect.

Q Did he appear to understand your questions as you questioned him?

A Yes.

Q Did he make responses for the most part that seemed appropriate to those questions?

[171] A Yes.

Q When was it you recorded in a police report the sequence of those answers and questions that went with those answers; do you recall?

A I don't recall the exact date.

Q Was it within a few days of the time you questioned him?

A I believe it was.

Q Would your memory then be better than it is now as to the exact questions you asked?

A Yes.

Q Can you tell the Court the exact questions without reference to that report to refresh you memory, the exact questions you asked which elicited the responses that were written by Mr. Mincey?

A Without reference to the report?

Q Yes.

A No. I couldn't go through that and quote them all.

Q I show you what is marked as State's Exhibit two and ask you if this is the report that you referred to and which you wrote the questions and repeated the answers?

A Yes. That is the report.

[172] Q When did you prepare that report?

A November 4, 1974.

Q With reference to that report, can you tell me what questions you asked, or as your memory is refreshed by that report, what questions you asked when the defendant Mr. Mincey wrote, "I remember somebody standing over me saying 'move nigger, move,' as I was on the floor beside the bed."?

A Yes. That would have been the question, "I then proceeded to advise him of his constitutional rights. I also advised him he was under arrest and charged with killing a police officer," I went on to question him, "What do you remember that happened?"

Q Do you remember what you said then to elicit the response which is, "this is all I can say without a lawyer"?

A The question by myself, "Do you remember shooting anyone or firing a gun?"

Q And do you remember what you then said which elicited the response, "I am going to have to put my head together. There are so many things that I don't remember like, 'how did they get into the apartment?' "

A There was a question in between there [173] with a head shaking in an affirmative manner which would have led to that response.

Q What was that question?

A That would have been, "If you want a lawyer now, I cannot talk to you any longer; however, you don't have to answer any questions if you don't want to. Do you still want to talk to me?" At that time Mr. Mincey gave an affirmative head shake and then I went on and asked, "What else can you remember?" which would be in response to the question you just asked me, "I am going to have to put my head together. There are so many things I don't remember like 'how did they get into the apartment' ".

Q What question elicited the next response of, "police"?

MR. OSERAN: Your Honor, I am not sure this is valid cross-examination. He is reading a report made into the record in which he made six days or seven days after the incident in question. I think he ought to be asked if he can recall what his questions were, if he is rehabilitating him and if he is not doing it in a proper manner.

THE COURT: He did that and he said he couldn't. [174] MR. OSERAN: I think he should ask him for each question before using the police report, otherwise put the police report in evidence.

THE COURT: I was going to suggest that. I thought you would object to that.

MR. OSERAN: I will object to that.

Q (By Mr. Howard) Without reference to your police report to refresh your memory, can you remember the exact question which led to the response, "police"?

A Not exactly.

Q Will you refresh your memory, please.

A It would be, "how did who get into the apartment?"

Q And his answer was, "police"?

A Right.

MR. HOWARD: Your Honor, we could go through everyone of these this way. Perhaps counsel and I could enter into a stipulation that the police report, which has been marked, would be his response, instead of going through it that way, and submit to the Court the police report which has the written questions along with the defense exhibit which the Court has, for the Court's determination.

[175] THE COURT: This has the questions written on it in his handwriting.

MR. OSERAN: But these were written on at a much later time.

THE COURT: I know but I would assume that these are the same as in the police report.

MR. OSERAN: I would rather have it that way.

THE COURT: To utilize this rather than put in the whole police report?

MR. OSERAN: Yes, because there is one problem with regard to the police report and that is that some of the questions in trying to reconstruct, I am sure Officer Hust made at least one mistake in the order of the questions and answers.

THE COURT: You have seen this?

MR. OSERAN: I have seen it.

THE COURT: Is that agreeable?

MR. OSERAN: The five pages that were marked?

THE COURT: I am confused because they weren't in the right order. There are the first six and then there are two separates. Did you have two different interviews?

THE WITNESS: I believe there were three [176] different interviews and I kept them in order as I went along and separated the information. That is when I wrote this to keep it straight.

THE COURT: Let us separate the different interviews, or is it all written continuously?

THE WITNESS: I believe some are continued right on. This would be the first page upon my entering intensive care. This was given to me by the nurse.

THE COURT: Put that on top of it and I will staple them in order.

THE WITNESS: I may have to go through them and correspond them with this. I had them in order at one time.

MR. OSERAN: You have numbers here: one, two, three, four, six. Here is five here, six, these would be seven and eight or eight and seven; is that correct?

A I believe so.

Q (By Mr. Howard) Will you look at those. Do they go as seven and eight? The record should show that he is marking seven and eight on them.

MR. OSERAN: Here is the problem with this. I believe these were marked by Officer Hust. [177] I don't believe they are in the proper order. Here is the first page. The page he has indicated as page one, the bottom line is, "this writing was used as a means of—", and "I can't say without a lawyer," is not consistent with page four where it says, "nobody knows John," but it is consistent with page six, "this writing was used as a means of talking because I could not talk at the time of the interview." Though the officer believes these are—

THE COURT: I took them out and put them in the order of one, two, three, four, five.

MR. OSERAN: What I am saying is that it is my understanding this would be the proper order.

THE COURT: I will take a short recess. Maybe you can get all these together and agree on some stipulation so we don't have to waste time.

RECESS

AFTER THE RECESS

LARRY HUST

previously called and sworn, resumed the stand and testified further as follows:

[178] CONTINUED CROSS EXAMINATION

BY MR. HOWARD:

Q Let me ask you at the outset, is defendant's Exhibit D now in order of the responses given to your questions as much as you can do so given the structure of defendant's Exhibit D?

A Yes.

MR. HOWARD: With the Court's permission, I will staple these together.

THE COURT: Very well. Do you have any objection to this being admitted for the purposes of what we have been trying to ascertain for the purposes of this hearing only?

MR. OSERAN: The statement itself.

THE COURT: Defendant's Exhibit D.

MR. OSERAN: Fine.

MR. HOWARD: I have no objection.

MR. OSERAN: With the understanding that I am not necessarily in agreement with the order that is being submitted, but I think the Court as well as I or anybody else can make that determination of what order the statements were elicited, by following the pattern as provided in the statements.

THE COURT: Very well.

[179] Q With regard to defense Exhibit D, there are some blue pen writings in small very small, generally longhand on each of these pages, or most of these pages. Is that your handwriting?

A Yes.

Q What are those notes; some are out in the margin and some are written above responses that you have identified as being the defendant's?

A They would have been the questions I asked the defendant which I made notes on that page.

Q Are those the complete questions that you asked or are those notes you made for yourself?

A Just notes for myself.

Q When did you make those notes?

A I believe the following morning.

Q When then did you sit down and write out complete questions and associate them with the responses as they were given in writing and by head movements of the defendant?

A I believe it would have been some time either later that day or the immediate following day.

Q That is the report that I had marked as State's Exhibit No. Two, is that correct?

A Yes.

[180] Q After advising the defendant of his rights, do you remember, without reference to your report, the third question you asked him?

A No.

Q Can you refresh your memory as to that question and his response?

A The third question?

Q Yes.

A "If you want a lawyer now I cannot talk to you any longer; however, you don't have to answer any questions you don't want to. Do you still want to talk to me?"

THE COURT: I thought we were avoiding this by putting this in?

MR. HOWARD: We are not, Your Honor, because the questions that are written in in pen and ink are not complete, but just notes that the officer made himself and are not the complete questions.

THE COURT: Do you have to go through every question?

MR. HOWARD: I have tried to make a stipulation with defense counsel that we could just for the purpose of this hearing use the officer's written supplement, or that portion of the supplement which deals with the questions and [181] answers because that is ultimately what we are going to end up with when refreshing his memory on each question and answer. However, counsel is unwilling to do that.

MR. OSERAN: I will tell you why. He is asking for him to refresh his memory and reading the questions that may or may not be the questions he asked the defendant.

THE COURT: This is to the best of his ability and I think he has a right to do that. I thought I was avoiding this by the other. I didn't realize this jotting. I will allow him to do it. If you want to avoid that just put in that portion, I don't care. Either way.

MR. OSERAN: Which portion.

THE COURT: Of this report which goes to that, what the question was.

MR. OSERAN: I believe, number one: that the report is inaccurate, and I believe also that the questions may or may not have been the questions asked. I think the date of the report is the fifth or six, which is eight days after the incident.

MR. HOWARD: Counsel wouldn't have to stipulate as to the accuracy or the truthfulness [182] of the responses.

THE COURT: Just what he testified to after you asked the questions. I wouldn't assume he would stipulate to the other. I was trying to avoid going through all this.

MR. OSERAN: For the purposes of what any aid it may give the Court, I concede to the Court that it would be useful to the Court, but I feel obligated to show an objection to it because I don't think it is accurate.

THE COURT: Will you stipulate to this: That the Court has indicated it would allow counsel for the State to ask the questions by the means of refreshing his memory from the report, over your objection, to indicate what the questions were he asked to each response, and that to avoid going through each one of those individual as we are doing, we would stipulate that if the question was asked, the answer would be as shown on the report, but in no way stipulate that is correct, or anything of that nature.

MR. OSERAN: If the question was asked—

MR. HOWARD: —and the officer were allowed to refresh his memory.

MR. OSERAN: —he would read the question as shown on the report.

[183] THE COURT: Yes.

MR. OSERAN: And that he has been reading the questions on the report.

THE COURT: Any way that you want to do it.

MR. OSERAN: I object to him reading it in the first place.

THE COURT: Yes. The record may show that stipulation.

MR. HOWARD: So stipulated. It is clear where the questions and the answers start in State's D. We could cut the rest of the report out but since it has been marked in evidence, we can stipulate the questions and answers portion is what we are submitting for this purpose.

THE COURT: Maybe I can extract them later and have it marked in with that stipulation. Is that agreeable with all the modifications we have put in?

MR. OSERAN: Fine.

THE COURT: Is that agreeable that I will extract from this exhibit just those parts that we are referring to and have that marked in evidence with the stipulation and the other portion of the report will not be in?

[184] MR. OSERAN: That is agreeable with me.

THE COURT: Fine.

MR. HOWARD: I have a couple of other questions.

Q (By Mr. Howard) During the course of these questions and answers did Mr. Mincey lose consciousness at any time?

A No.

Q Did he other than the mention of a lawyer on several occasions, did he tell you he didn't want to talk to you?

A No.

Q Did he at any time, in fact, request that you return and talk to him again?

A Yes.

Q Did you do anything to force or duress or use duress in any way with regard to Mr. Mincey?

A No.

Q Did you lay your hands on Mr. Mincey at all?

A No.

Q Did you use any form of mental coercion?

MR. OSERAN: I object, what the Officer believes mental coercion is.

THE COURT: Overruled.

[185] A No.

Q Did you threaten him in any way?

A No.

Q Did you make any promises to him?

A No.

Q During the course of your interview with Mr. Mincey at the hospital was there anyone else present besides the nurse you referred to, Elizabeth Graham?

A Yes. There was a Mr. Frank Sharp, who is the service coordinator for that floor, was present during some of the interview.

Q Did either Mrs. Graham or Mr. Sharp take any part in questioning while you were questioning Mr. Mincey in any way?

A No.

Q Did either of them threaten Mr. Mincey in any way?

A Not in my presence.

Q Did either of them make any promises to Mr. Mincey?

A Not to my knowledge.

MR. HOWARD: No further questions at this time, Your Honor.

[186] REDIRECT EXAMINATION

BY MR. OSERAN:

Q Larry, how come you went in three times?

A Various times the nurse or the doctor would have to go in to do certain medical things. At that time I would leave, or if it looked like he was getting a little bit exhausted I would leave for a while.

Q During the course of these interviews, how long did the entire three interviews take, from what period of time to what period of time?

A It wasn't very long; probably not more than an hour total for everything.

Q During that hour, he was receiving, during the course of that hour, on some occasions he was receiving medical aid from the doctors and nurses?

A Yes.

Q And during that hour sometimes he appeared to be exhausted; is that correct?

A Not exhausted but he was getting—you know,—

Q The point of being exhausted?

A Yes.

Q You use the word "exhausted." I am not [187] trying to put words in your mouth.

A I didn't want to get him to the point of being exhausted.

Q But he was tiring easily?

A Slowing down a little bit.

Q He was in a serious or critical condition at that time, or do you know?

A I don't really know the exact term they had at that time.

Q Prior to questioning him, you told him what had happened in effect, did you not?

A What do you mean?

Q You told him he is accused of shooting a police officer?

A Yes.

Q Did you also tell him he—he didn't know who the police officer was; isn't that correct?

A By name or?

Q Who the police officer was. Didn't he ask you in the course of the statements who the police officer was?

A Right.

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[190] Q Did you talk to Elizabeth Graham, the nurse, why all these people were wounded?

A She wasn't in the emergency room.

Q Excuse me?

A She was not in the emergency room.

Q Did you talk to her about it?

A I believe I mentioned it later, yes.

Q You mean after the time you took the statements from Mr. Mincey?

A No. I believe it was before.

Q You told other people about what had happened, did you not?

A I don't recall who I all talked to.

Q Do you recall Mr. Mincey telling you in a statement, "If I don't tell anybody, I don't have to make things up to make the lies look like the truth. Let John talk. All he can do is tell the truth or get caught telling lies, the same thing. I want a good lawyer. I am charged with murder. That is bad whether you did it or not. You don't have to prove you did something. You have to prove you didn't." Do you [191] recall him giving you that?

A Yes.

Q Do you recall what question you asked in regard to eliciting that?

A The exact question, no. I don't recall.

Q You put notes on there to help you remember what your questions were on the statements that were written by the defendant; is that correct?

A Yes.

Q And you believe you did that the following morning; is that your testimony?

A I am quite sure I did it the following morning.

Q Now you are sure you did it the following morning?

A Yes.

Q You may have taken other notes?

A Later that day or the following morning I am sure I did. I wrote it out in longhand.

Q The defendant did ask you to return or advise you you could return and talk to him after he had a lawyer and after he could get his head clear and get the facts clear; did he not?

A Yes.

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TESTIMONY OF ELIZABETH GRAHAM

[193] DIRECT EXAMINATION

BY MR. HOWARD:

Q Will you state your full name and occupation for the record, please?

A Elizabeth Graham. I am a registered nurse.

Q Where are you employed?
A The University Hospital, intensive care.
Q Calling your attention to the later part of October, 1974, did you have a patient in intensive care unit by the name of Rufus Mincey?
A Yes sir.
Q Did you have occasion to be present on the day Mr. Mincey was admitted to the intensive care unit?
A Yes sir.
Q Did you at that time meet a gentleman who later became known to you as Detective Hust from the Tucson Police Department?
A Yes sir.
Q About what time do you recall during the course of the day that Mr. Mincey was admitted and Detective Hust was present at the intensive care unit?
[194] A I cannot give you the exact time.
Q Was it during the course of the morning or afternoon?
A It was in the evening because I worked the evening shift so it was sometime after six, but I don't know what time.
Q Did Detective Hust have some conversations with Mr. Mincey, that is, did he ask him some questions and get some written answers from Mr. Mincey?
A Yes sir.
Q Prior to Detective Hust arriving and asking those questions of Mr. Mincey, did you receive any kind of written communication from Mr. Mincey?
A I don't remember because he couldn't talk, and there was a lot of admitting procedures. I don't remember about anything or not.
Q Let me show you Defendant's Exhibit D, the first page, and ask you if you recognize that at all?
A Yes sir.
Q As to the writing at the top of the page, did you recognize that?
A Yes sir.
Q Where did you see that before?
[195] A It was in Rufus' room on the clipboard.

Q During the time that Detective Hust spoke with Mr. Mincey, did he have permission of yourself and other members, doctors and members of the hospital staff, to speak with Mr. Mincey?
A Yes.
Q Did you stay present with him while he asked him questions?
A Yes.
Q Was Mr. Mincey under the influence of any kind of drug at that time?
A I did not give him anything, no. I don't know if—I don't think he got anything in the emergency room because of other problems involved. I don't think he got anything.
MR. OSERAN: I object to the answer and ask it be stricken because she doesn't know.
THE COURT: Sustained.
Q That is not your fault. How did Mr. Mincey, how was he injured when he was there on the 28th; what was the nature of his injury?
A He had a gunshot wound.
Q Where was the gunshot wound?
A His bottom but I am not sure, I think at the time there was some question if it was the sciatic nerve, but I didn't know at that time [196] if it was the sciatic nerve or not.
Q Were there any head injuries?
A No.
Q Did Mr. Mincey appear to be alert and understand what questions Detective Hust asked him?
A Yes.
Q Did Detective Hust or anyone else that was present do anything to force Mr. Mincey to answer questions?
A No.
Q Did anybody physically abuse Mr. Mincey during the course of the questions by Detective Hust?
A No sir.
Q Did anyone mentally abuse Mr. Mincey, that is, threaten him or call him names during the course of this procedure?
A No.
MR. HOWARD: No further questions, Your Honor.

CROSS-EXAMINATION

BY MR. OSERAN:

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[197] Q You did see him write this?
A Yes. I watched him write everything but I can't say what he wrote.
Q You saw him write this, "he knocked at my door. I thought he was cool. He had a .38"?
A Yes sir.
THE COURT: When was that written, before the officer came in or after the officer came in?
A (By the witness) It had to be after because I didn't ask him anything about what went on.
THE COURT: Very well. I was confused on that, where this started.
Q (By Mr. Oseran) What is the intensive care unit?
[198] A What is it?
Q Yes.
A Surgery and intensive care for critical patients.
Q Rufus was in critical condition at the time he was in that room, I would imagine?
A He wasn't critical, no.
Q Your opinion?
A Serious.
Q Serious and critical?
A He wasn't critical because his vital signs were stable and he was awake.
Q He was breathing okay?
A Yes. He had an intertrach tube, but his respirations were normal.
Q What is that?
A I think it was in his mouth. It is the tube that either goes in his mouth or nose, and goes to the trachia to aid him in respiration in case he had trouble. It was a precautionary measure.
Q Was it working?
A Sure it was working, yes sir.

Q What was it doing?
A It was connected.

• • • •

[199] Q Was there also a mask on his face?
A No. There was a t-tube, t-bar.

• • • •

[201] Q Would a more critical patient have a mask or have a tube in the trachia?
A Have the tube.
Q So, if he just needed some aid in breathing, then he would have a mask; is that correct?
A Right.
Q Now, you admitted Officer Hust into Rufus' room to allow him to talk with Rufus, did you not?
A Yes.
Q And who advised you to allow that?
A Nobody.

• • • •

[202] Q Did anybody give you permission to allow me to see Debbie Johnson?
A No. That is an individual thing.
Q What is an individual thing, to let somebody see a patient or not?
A Yes. It is up to the nurse.
Q Officer Hust, you know who Officer Hust is?
A Yes.
Q He wrote you some notes during the course of his interview with Mr. Mincey; is that correct?
A Detective Hust, no.
Q Wrote you some notes?
A Wrote me notes?
Q He didn't write you notes?
A No.
Q He talked to you, though, didn't he?
A Yes.
Q He asked you to encourage Rufus to talk to him, didn't he?
A No.
[203] Q When you came in and advised Rufus during a break in one of the interviews to cooperate and be as helpful as he could be, didn't you?

A I did tell Rufus that it might help, but nobody told me to do that.
Q But you did it on your own?
A Yes.
Q And Rufus was cooperative with Officer Hust, wasn't he?
A Rufus was great.
Q He was in pain?
A A moderate amount, yes sir. He was cooperative with everybody.
Q He was cooperative with everybody; he was trying to help everybody the best he could?
A Yes.
Q Was he a good patient, Rufus?
A Super.
Q Did you see Rufus when he first came out, up from surgery?
A I don't remember him coming from surgery. I think he came from E.R., but I admitted him and it would be in the nurse's notes where I admitted him from.
[204] Q Was he awake or asleep?
A Awake.
Q Was he asleep at a later time?
A Not as long as I took care of him that evening.
Q You don't recall him being asleep at the time Officer Hust came in?
A He didn't have time to sleep because there were so many admitting things to pester him with?
Q You weren't talking to him?
A Only telling him what I was doing.
Q Can you describe what other tubes he had in his body?
A He had a foley, I remember that, a foley catheter, a tube in his bladder. He had the intertrach tube.
Q He had a tube in his bladder; how was that inserted into him, into his penis?
A Yes sir.
Q And the intertrach tube goes down his throat?
A Yes sir.
Q And what else?
A And I believe he had a nasal gastric tube.

[205] Q What is a nasal gastric tube?
A A tube in his nose and down to his stomach.
Q What does that do?
A It is to keep him from vomiting. A lot of things in him.
Q Did he have any other needles?
A Yes. He had an I.V., intravenous, I don't remember where or what kind but he did have an I.V.
Q Do you remember any more than one needle in his body?
A No, I don't.
Q Was he lying on a bed?
A Yes.
Q Was he laying on his back?
A Yes.
Q How long had he come from surgery, do you know?
A I don't know that he went to surgery, but how long?
Q Yes.
A Before what?
Q Before Officer Hust came to talk to him?
A I couldn't say. I don't know.
[206] Q You described at least one needle in his arm?
A Yes.
Q A tube in his penis?
A Yes.
Q A tube down his throat and possibly down his nostrils and into his stomach, and laying in bed and being fed intravenously, and this is the condition in which he was interviewed by Officer Hust?
A Yes sir.
MR. OSERAN: Thank you.
MR. HOWARD: No further questions.
THE COURT: You may step down. You may be excused if you wish.
MR. OSERAN: Thank you.
THE COURT: Is that all of your testimony?
MR. HOWARD: I have nothing further.
THE COURT: Does the defense have anything further?

MR. OSERAN: I could call Stuart Patterson but I will avow that his testimony would be the same as that of Deborah Anderson.

THE COURT: It is up to you whether you call them or not. I cannot accept that as an avowal.

* * * *

[208] THE COURT: All right. The estimated time is two hours.

As far as the voluntariness portion of it, it is my understanding that the State has no intention of using any statements made by the defendant, in their case in chief. The only thing that the Court has to determine in this matter is whether they should be used in the event Mr. Mincey takes the stand for impeachment purposes.

* * * *

IN THE SUPERIOR COURT OF THE
STATE OF ARIZONA
IN AND FOR THE COUNTY OF PIMA

No. A-26666

[Title Omitted in Printing]

RESPONSE TO STATE'S OPPOSITION TO
DEFENDANT'S MOTION TO SUPPRESS
SEARCH AND SEIZURE

COMES NOW the Defendant, RUFUS JUNIOR MINCEY, by and through his attorney, RICHARD OSERAN, and submits the following as his response to State's opposition to Defendant's motion to suppress search and seizure.

If the arrest of the Defendant was lawful, then the metro officers could seize only those objects which were on the arrestee's person in the immediate area of the arrestee's control in which the arrestee might reach to grab a weapon or other evidenciary item. The State relies upon several cases to justify their search of the Defendant's apartment without a warrant as being "in the course of arresting . . . and of securing medical assistance", but the cases that the State cites for authority are inapplicable to this proposition. *U.S.* v. *Briddle*, 436 F.2d 4 (8th Cir. 1970) is a case wherein the Defendant was convicted of possessing a sawed-off shotgun. In *Briddle*, the officers entered the apartment with a search warrant and seized the shotgun which was in plain view in the bedroom near where Mr. Briddle was standing. In the present case, we are talking about a full-blown search and inventory which occurred at a time after the Defendant had been removed from the apartment, and after the scene had been "secured" and which lasted several days. As Lieutenant Fuller testified, none of his metro officers participated in any search and they seized nothing in the apartment, but merely secured the scene and waited for the investigative forces to arrive. The State also relies on *U. S.* v. *Lee*, 308 F.2d 715 (4th Cir. 1962) for the

proposition that the arresting officers have the authority to conduct a search at the Defendant's apartment. The *Lee* case was decided seven years prior to and is controlled by the Supreme Court's holding in *Chimel* v. *California*, 395 U.S. 752 (1969).

In the case at bar, the arresting officers merely secured the crime scene and then a team of trained investigators conducted a thorough search and inventory of the apartment which lasted several days. The State boldly asserts that "nothing in *Chimel* alters this right of police officers to secure their arrests by inspection of the premises". This statement is only true to the extent that "inspection of the premises" means observing objects in plain view in the immediate area and control of the arrestee "there is no comparable justification, however, for routinely searching any room other than that in which an arrest occurs—or for that matter, for searching through all the desk drawers or other closed or concealed areas in that room itself." *Chimel, supra.*, P. 763. In essence, the holding in *Chimel* was to limit the scope of any search to the area immediately surrounding the arrestee to prevent the arrestee from seizing a weapon or destroying any evidence that might be near him. In the present case, no seizure was made of any item by the metro officers who effected the arrest. Therefore, any search could not be incidental to the arrest. There was no testimony that the vial of heroin in the bathroom was observed or seized by any of the metro officers. In fact, nothing was seized by the metro officers. The weapon was observed by the metro officers, but it was not seized, nor according to Lieutenant Fuller's testimony, was the caliber determined until a later search of the apartment.

The State also argues that there was a constructive seizure of the heroin. Although the State failed to explain what constructive seizure is, it is clear upon examination of *U. S.* v. *Glassel*, 488 F.2d 143 (9th Cir. 1973) as cited in their brief, that their argument is without merit. In *Glassel*, the constructive seizure was such because the agent was lawfully in the apartment with the contraband in his control at the time of the arrest by the other officers.

The State also opposes the Defendant's motion to suppress on the basis of the theory the State coins "homicide scene investigation". Assuming that such a theory has any validity, the condition precedent to such a search is that there be a homicide. Lieutenant Fuller, in his testimony, stated that the crime scene was turned over to Officer Renya, and that the search commenced subsequent to the removal of the wounded, and prior to the time that they were notified that there was in fact a homicide. Although the prosecutor was able to find additional cases in other jurisdictions which he alleges support his homicide scene investigation theory, we need only be concerned with this jurisdiction. The Ninth Circuit is the only Federal court which has dealt with this issue. *State* v. *Sample*, 107 Ariz. 407, attempted to overrule Arizona law as set forth in *State* v. *Lenahan*, 471 P.2d 743. The *Lenahan* decision held, citing *Katz* v. *U. S.*, 389 U.S. 347 (1967) that a warrantless search was per se unreasonable unless it came within one of the few delineated exceptions, namely, (1) consent, (2) exigent circumstances, (3) incident to a lawful arrest. In *State* v. *Sample*, in its attempt ot reverse the *Lenahan* decision, the Court held that "warrantless search by Officer of mobile home where body of defendant's wife was discovered, two hours after arrest of defendant, was permissible and fruits of search were admissible against the defendant, since nothing in the constitution prevents police from making a warrantless search of the premises in which a victim is found dead and, such is true even if the defendant exercised joint control of premises along with the victim." *State* v. *Sample* was reversed by *Sample* v. *Eyman*, 469 F.2d 819 (9th Cir. 1972). In *Sample* v. *Eyman*, the Ninth Circuit in reversing the Arizona Supreme Court held "the record below clearly indicates this was not a search incident to a lawful arrest, and under the circumstances present, a search warrant was necessary. There was no danger that evidence would be destroyed since the dwelling was guarded by policemen. The appellee having given no reason why a warrant could not be obtained, we find a failure to have done so constitutional error." The Arizona Supreme Court al-

though reversed by the Ninth Circuit has in two subsequent cases attempted to make a distinction. In *State* v. *Duke*, 518 P.2d 570 the Arizona Supreme Court held in a case clearly limited to its facts, that where the defendant had called the officers to the scene of the crime, and the victim of the crime was in fact a resident of the premises, and where the officers had relied upon the defendant's statements that the deceased had committed suicide, that the officers had the authority to conduct a search of the area, "relying at first on the representations of the defendant that the deceased had committed suicide. Under these circumstances, a contemporaneous warrantless search of the scene of the crime at the time of the discovery of the body was, we believe, reasonable . . . ." *Duke, supra.* P. 574.

In the present case, police were not called to the scene of the crime by the Defendant, they were not called to the scene of a homicide, the deceased was not in fact a resident or one who exercised any control over the premises, and the search was not limited in scope, but lasted three to four days and resulted in an inventory of all the contents of the apartment.

The prosecution also cites *State* v. *Superior Court*, 110 Ariz. 281 a 32-word decision which gives no facts, but held "where the police are called to the scene of a homicide, they may lawfully investigate such portions of the premises as are reasonably necessary to establish the true facts of the homicide". We find the words of *Sample* v. *Eyman, supra.* more compelling. The search was not conducted contemporaneously with the arrest, and there was no danger that evidence would be secreted or destroyed since the apartment was being guarded by policemen. The State, having given no reason why a warrant could not be obtained, had no right to search the defendant's apartment. The exception as delineated by the Arizona Supreme Court refers only to scenes in which a homicide victim is discovered. In the instant case, the search began before there was a homicide. Therefore, the cases cited by the State are inapplicable to the facts of this case. In any event, this Court is

obligated to follow the ruling of the 9th Circuit and to suppress all evidence resulting from the unlawful search.

For all the foregoing, the Defendant's motion must be granted.

RESPECTFULLY SUBMITTED this 3rd day of February, 1975.

BOLDING, OSERAN & ZAVALA

By /s/ Richard Oseran
RICHARD OSERAN
P. O. Box 70
La Placita Village
Tucson, Arizona 85702

[Certificate of Service Omitted in Printing]

IN THE SUPERIOR COURT OF THE
STATE OF ARIZONA
IN AND FOR THE COUNTY OF PIMA

No. A-26666

MARY ANNE RICHEY
Judge of the Superior Court

Date February 7, 1975

STATE OF ARIZONA, PLAINTIFF

v.

RUFUS JUNIOR MINCEY, DEFENDANTS

MINUTE ENTRY

IN MATTER UNDER ADVISEMENT:

The Court having taken the matter under advisement rules as follows:

IT IS ORDERED the Motion to Suppress based on unlawfulness of arrest is DENIED.

IT IS ORDERED that M tion to Suppress based on unlawfulness of search and seizure is DENIED as to any items seized on October 28, 1974 and October 29, 1974.

IT IS ORDERED that Motion to Suppress statements is GRANTED as to use of same in the State's case in chief.

IT IS ORDERED that Motion to Suppress statements for use for impeachment, if same is appropriate, is DENIED.

IT IS ORDERED that Motion to Reconsider ruling on Motion to Sever is DENIED.

CC: Court Admn.
County Attorney
Bolding, Oseran & Zavala
Main Office (Mary Alice Martin)

MAXINE MOWRER
Deputy Clerk

IN THE SUPERIOR COURT OF THE
STATE OF ARIZONA, COUNTY OF PIMA

EXCERPTS FROM MINCEY'S JURY TRIAL—
MAY 29, JUNE 3, AND JUNE 6, 1975

TESTIMONY OF MORRIS REYNA, JR.

DIRECT EXAMINATION

• • • •

[26] Q And about how long after you arrived there, was it before the victims were removed from the apartment?

A Very short period of time, I don't believe it was over two minutes at the most. A very short period.

Q This was accomplished primarily by Fire and Rescue people?

A Fire Rescue people and ambulance personnel.

Q Then, what did you do once they were removed?

A I went again to make sure that we had secured in the hallway, as I proceeded to use Officer Lynch to assist me in crime scene investigation. I also had the ID Technicians, the photographers respond to the scene and proceeded to photograph everything.

• • • •

[46] MORRIS REYNA, JR.,

was recalled as a witness for the State and, having been previously duly sworn, was examined and testified further as follows:

DIRECT EXAMINATION (RESUMED)

BY MR. HOWARD:

Q Detective Reyna, were you there on the 28th of October during the time that or during the entire time that Bill Condron, the Police Illustrator, was making his measurements and sketches?

A Yes, sir.

Q And during that same period of time, photographs were being taken?

A Yes, sir.

Q Do you recall who the photographers at the scene were?

A O'Sullivan and Mr. Scott.

Q And did they take photographs at your direction?

[47] A Yes, sir, they did.

Q Had you been assigned by some individual to investigate with regard to the crime scene itself?

A Yes, Sergeant Bunting, head of the Homicide Detail, had responded to the apartment and upon arrival there, informed me that I was to take charge of the crime scene investigation.

Q Did he arrive there at the same time you did or afterward?

A About the same time, I believe he got there just a few minutes after I did.

Q And was Officer Lynch assigned to aid you in the crime scene?

A Yes, he was.

Q And did he work there under your investigation?

A Yes, he did.

Q When you arrived at the scene, was there any search or crime scene investigation under way?

A No, sir, the only thing that had been done was to render aid to the injured parties and securing of the scene.

Q You didn't see anybody search or move things around, Metro agents or things like that?

[48] A I saw no one conducting a search of that type.

Q Then did you and Officer Lynch, under your direction, search the residence systematically?

A Yes, sir, we did.

Q Starting with the bedroom, did you search the bedroom?

A Yes, I did.

Q What did you find, if anything, on the bed in the bedroom?

A On the bed in the bedroom I found a Llama .380 semi-automatic pistol, commonly referred to as an auto-

matic pistol. Also I found some expended brass casings, three-eighths casings, that had been already fired and essentially that was all on the bed. On the headboard of the bed, there was a jar of lactose.

MR. OSERAN: I would object to what was in the jar unless this officer performed tests that would indicate the contents of that jar.

• • • •

[71] A Yes, I did. Going from the dresser at the foot of the bed, I found a roll of tin foil. Right next to it on the chair, I found a green off-duty Air Force shirt, with objects inside the shirt pockets. Then in the chest of drawers, in the right corner of the diagram, I found a box of Hirtemberg, Austrian ammunition, which contained seventeen live cartridges and also found other objects of men's clothing in that chest of drawers and other objects throughout the apartment.

• • • •

[87] Q By the use of State's Exhibit 54 then, can you illustrate your testimony concerning the box of Hirtemberg ammunition?

A Yes, the photo shows the box there of Hirtemberg ammunition, which was found in the chest of drawers in the bedroom, and shows the position in the drawer, as we initially discovered it.

Q Thank you. Did you have occasion—you mentioned a jacket or an Air Force fatigue coat or shirt on that chair. Did you have an opportunity or did you search the pockets of that jacket?

A Yes, sir, I did.

[88] Q What did you find in the pockets?

A In the left pocket, I found a—

MR. OSERAN: Excuse me, your Honor, I would like a little more foundation as to what day the pockets of the shirt were searched?

BY MR. HOWARD:

Q When did you search the pockets?

A On that evening, 28th of October, on my initial search of the scene.

Q What did that search reveal?

A There were two pockets in the shirt on the front. A left pocket had life savers, a pin that said, "U.S. Government" and I believe a chap stick. The other pocket had a green wallet containing identification, "Rufus Mincey", some fourteen papers of white powder, greyish powder, which was analyzed by the Crime Lab to be determined—

MR. OSERAN: I object to any conclusion as far as—

THE COURT: Sustained, as to any conclusion as to what it contained.

BY MR. HOWARD:

Q That was submitted later on to the Crime Laboratory?

A That was submitted later on.

[89] Q And can you describe these papers you are talking about?

A They are not actually papers, they are referred to as papers. They were of aluminum foil and they were then folded, from little squares, with the powder contained in, in a triangular type shape. There were fourteen of them, plus a Twenty Dollar Bill, in one plastic envelope, that was in the pocket. There was also a metal tube, which I called a "toilet tube" type of tube. That toilet roll fits on the holder in the restroom and besides being hollow, and the spring being removed, inside there I found two larger papers of heroin, containing a bigger quantity than the others, plus some cotton.

MR. OSERAN: I would object and ask that the answer be stricken.

THE COURT: Sustained. I caution you in your testimony not to refer to what it contained.

MR. OSERAN: He knows better than that.

THE COURT: Yes, that should be testified to by a chemist.

MR. HOWARD: Refer to what you saw?

THE WITNESS: Powder substance in the aluminum foils.

[90] BY MR. HOWARD:

Q I show you State's Exhibit 36 and ask you to examine the contents of that envelope and turn in your chair.

A I do recognize this.

Q What does State's Exhibit 36 consist of?

A It consists of the green wallet, One Hundred and Twenty Dollars in cash and the identification of Rufus Mincey, the same items I found in the right front pocket of the green work uniform shirt.

Q When you say identification, can you describe that in more detail?

A Yes, there are some items with his pictures, Military Identification Card with his name and photo on it.

Q And also a driver's license?

A Yes, driver's license.

Q I show you what has been marked as State's Exhibit number 42 and ask you to examine it in the same fashion. These items, State's Exhibit number 36 appear to be in substantially the same condition as when you first removed them from the pocket of that jacket?

A Yes, sir.

[91] Q What is contained in State's Exhibit number 52?

A That contains the metallic, what I called the toilet rod, fourteen foil papers of heroin—

MR. OSERAN: I'm going to object.

THE COURT: Now—

MR. OSERAN: Your Honor, I would ask the Court to caution this witness.

THE COURT: I have, Mr. Oseran, and I will take care of it without your help.

MR. OSERAN: Thank you.

THE WITNESS: And the fourteen papers of powder substance, the metallic tube, some cotton, and the two larger papers of the powdered substance. In addition, it also contained a Twenty Dollar Bill, along with the fourteen papers in a separate plastic envelope.

BY MR. HOWARD:

Q Was that plastic envelope part of the property removed from the pocket?

A That was the way I found it in that plastic bag and those items were kept in that plastic bag.

* * * *

[128] Q Did you find there or anywhere else any burned spoons?

A I did not locate any burned spoons anywhere in the apartment. I even checked this area (indicating), which is the cupboard and the drawers, where all the silverware was. I did not locate any spoons that showed signs of [129] being burned.

Q Did you find any cotton swabs, cotton balls in the apartment?

A I found no cotton balls with the exception of cotton that was contained within the metal tube, that I found in the green shirt. That is the only cotton that I found.

Q Back in the immediate room then, did you locate any syringes in the bedroom?

A Yes, I did.

Q Where?

A I located a syringe on top of this table (indicating) in this approximate location there.

Q Did you locate on the floor or furniture in the apartment, anywhere else, another syringe?

A I believe I located one other syringe, an insulin syringe, either here (indicating) or in a drawer. I don't recall the exact location, but those are the only two syringes I located.

Q And no cotton balls on the floor?

A I could not find any cotton balls.

* * * *

[132] Q You had to pull the carpet up then and [133] that picture shows the carpet pulled up in a fashion that you pulled it up, is that right?

A Yes, I had to actually tear the carpet up, from where it was fastened onto the ground, and actually cut the carpet in order to be able to do this.

* * * *

[150] Q Do you know the total number of items that were taken into evidence?

A Between two and three hundred items.

* * * *

TESTIMONY OF DR. MARTIN SILVERSTEIN

DIRECT EXAMINATION

[23] A On the x-rays, there was a projectile appearing, a foreign body appearing to be a bullet wound adjacent to the neck of the right femur, that is the right hip bone, as it passes toward the pelvic bone.

Q Could you tell anything, Doctor, about the angle that bullet entered or the point on which it passed as it passed through the flesh of Mr. Mincey?

A Not with great specificity. The track was very short for a wound from entrance of the position of the bullet within the buttock and it is impossible to identify a track unless one examined it surgically or at post-mortem because of deflection by tissue and bone and this bullet had struck a portion of the pelvic bone and a portion of the neck of the thigh bone, the femur.

* * * *

[26] Q Now, Doctor, I think the question was, what was Mr. Mincey's condition upon arrival at the hospital?

A He had a gunshot wound in the right [27] buttock and he was apnic or breathing insufficiently so he required ventilatory or respiratory resuscitation. In addition, he required drugs to counteract the—

MR. OSERAN: Excuse me, Doctor, I would show an objection again.

THE COURT: Overruled.

THE WITNESS: —as part of that treatment.

BY MR. HOWARD:

Q Doctor, could you just tell us what drug it was that was administered?

A Among the resuscitative drugs, he received Narcan.

Q What was the condition of his lower extremities upon his arrival at the hospital?

A Since he was depressed almost to the point of coma, it was very difficult to examine function in the lower extremities at this time. There was some reason to believe that he did not respond well to stimuli applied to the gunshot wound.

Q And what would that mean, what kind of stimuli are we talking about and what does that mean in layman's terms?

A It means being pricked with a pin or the [28] end of a specific instrument. Normally a patient would withdraw from a pin prick. However, if you can't feel the pin prick or if he is paralyzed and cannot withdraw, then the limb doesn't move and that is what happened in Mr. Mincey's case.

Q You mentioned the projectile being near or in deep muscle tissue and near a specific nerve. What nerve are we dealing with here?

A The sciatic nerve, long nerve of the limb, lower limb.

Q And was there any evidence in your examination, either at that time or in the patient's early course in the hospital indicating damage to that nerve?

A Yes, there was. The patient was unable to move the limb adequately and detailed examination indicated that nerve roots, L 4 and L 5, which compose a portion or comprise a portion of that nerve, were injured.

Q And generally, what is the sciatic nerve, what functions does it have?

A It controls almost all the large muscle movements within the lower leg and particularly the foot, calf, knee joint.

* * * *

TESTIMONY OF RUFUS MINCEY

• • • •

CROSS EXAMINATION

[231]

Q You're quite sure that Officer Headricks fired at you first?

A Yes, sir.

Q You saw a gun in Officer Headricks' hand?

A Yes, sir.

Q What kind of gun?

A It was just a gun.

Q You don't know what kind?

A No, sir.

Q You'd seen Chuck's gun. It was a .38; is that right?

A Yes, sir.

Q And Mr. Hodgeman you testified didn't have a gun?

A No, sir.

Q Because you gave him yours?

[232] A Yes, sir.

Q Do you recall being—testified—being asked some questions by Detective Hust at the hospital, U of A Hospital on the evening of this occurrence?

MR. OSERAN: Ask for some foundation, where and when.

MR. HOWARD: I haven't gotten there.

THE COURT: Let him get there, Mr. Oseran. And the record may show your continuing objection to this.

MR. OSERAN: Fine. And could he ask him also—

MR. HOWARD: Could we approach the bench, if counsel is going to argue.

MR. OSERAN: I want to lay a foundation as if he knows who Detective Hust.

THE COURT: Well, I think the proper way to do that, Mr. Oseran, is to let him lay the foundation he wishes to lay. And if you don't think it's right, you may object. But don't tell him how to do it.

MR. OSERAN: Fine, Your Honor.

Q (By Mr. Howard) I think your answer was yes, or no?

A The guy came to see me in the hospital.

[233] Q A detective with the police department?

A He said he was a policeman.

Q Showed you his identification?

A Yes.

Q And was he with a nurse?

A Yes, they woke me up.

Q It's a nurse that was a nurse in the Intensive Care Unit during the time you were there?

A I guess she was working Intensive Care Unit. That's where I was at.

Q But you got to know her afterwards. Do you remember it's the same nurse?

A No, sir, I remember seeing her earlier when we—when we first started this. And she came in.

Q Do you remember seeing her at that time?

A Yes, sir.

Q With the detective, the fellow that said he was a policeman?

A Well, she could have been the same one. I know it was a nurse that came in there with him.

Q And do you recall him advising you of your rights?

[234] A Well, first he told me that I shot a policeman.

Q Okay. Then he advised you of your rights?

A Yes, sir.

Q And he asked you if you would, in light of those rights, talk to him?

A Well, he asked me if I knew Chuck's identification, where he worked and where he lived.

Q Okay. And then he asked you some questions about the incident?

A Sir?

Q Then he asked you some questions about the incident?

A Well, he was just talking, mostly, you know, he gave the impression that he was concerned as to how my health was and how I was feeling. That's the impression he gave.

Q Well, I'm asking—you got that impression from him?

A Yes, sir.

Q I'm asking you if he asked some questions about the incident?

A Yes, sir.

Q And you answered those questions by [235] writing the answers; is that right?

A Well, I was trying to help him the best I could.

Q Okay. And it was in this helpful attitude that you wrote the answers to questions; is that right?

A Well, I was trying to answer to the best of my recollection at the time that this was going on.

Q Okay. And you had to write the answers because you had some tubes in your mouth, right?

A Yes, sir.

Q And you wrote the answers in your own handwriting?

A Yes, sir.

Q Do you recall being asked, or do you recall telling Detective Hust at that time that you weren't even sure that the guy who came in the bedroom had a gun?

A I can't say for sure because I don't know what I—which guy he was talking about.

Q You didn't know from the context of what he said what guy he was talking about?

A No, sir.

Q It wasn't when he was talking to you about what went on at the moment that these [236] police officers entered the apartment, he was—that he was asking you that?

A He asked me a lot of different things.

Q The question is: Do you recall telling him that you weren't even sure that the guy that came in the bedroom had a gun?

A Well, I can't say for sure.

Q You don't know?

A I—right.

Q You're sure now that he had a gun?

A Well, I know the guy that shot me, Brian, I know that he had a gun.

Q He's the guy that came in the bedroom at the point of entry?

A There's no telling what time he was talking about.

Q You weren't aware of anyone else in the bedroom until you woke up on the floor over there; isn't that right?

A Right.

Q And all you remember when you woke up on the floor is somebody yelling at you?

A Yes.

Q And you didn't see any gun at that time?

A I don't know. The dude that was [237] standing up over me might have had a gun, might not. I can't say.

Q You thought he might be talking about the guy that was standing over you when you woke up over here?

A I can't say who he was talking about.

Q Do you recall being asked these specific questions? It's on the fifth page and top of the sixth.

Do you recall being asked these specific questions by Detective Hust?

"Detective Hust: Go ahead.

"A When I heard all the noise I ran out to check it out. Then I went back to the bedroom.

"Q" —By Detective Hust—"Where was Chuck?

"A (By Mr. Mincey) Where was Chuck?

"Q" —by Detective Hust—"Yes.

"A (By Mr. Mincey) (Mincey shrugged his shoulder in a manner indicating he didn't know.)

"Q —By Detective Hust—"Did this guy that came into the bedroom have a gun?

"A I can't say for sure. Maybe the [238] guy had a gun."

MR. OSERAN: I would ask that the—Your Honor, that the next question and answer be read. I think it's part of the same context of this conversation.

THE COURT: No. I don't believe so.

MR. HOWARD: I'm sure counsel can do that.

THE COURT: That's part of the context of this. If you wish to bring it out, you may.

MR. OSERAN: Fine.

Q (By Mr. Howard) Do you recall those specific questions and writing those answers?

A Well, I can't say who he was talking about because he was asking about Chuck. So there's no telling who he was talking about.

Q But he was talking about where Chuck was at the moment those officers entered the apartment, was he not?

A Yes.

Q You didn't tell Officer Hust at that time that the officer shot you first, did you, Mr. Mincey?

A He didn't ask me.

Q He did ask you at one point in there if you had anything else to add, didn't he?

[239] A Yes, sir. I think my answer at that time was I couldn't say anything without seeing a lawyer first.

Q Did you see your—did you see your bullet strike Debbie?

A No, sir.

MR. OSERAN: I would object to the question, Your Honor. It's—there's no testimony to believe that his bullet struck Debbie. That—that bullet was lost.

MR. HOWARD: Your Honor, I think that's the only evidence that there is that it was a .380.

THE COURT: You may ask the question that way.

Q (By Mr. Howard) And did you see her move to the closet?

A Yes, sir.

Q You never saw a badge at any time in that apartment?

A No, sir.

Q You didn't have any idea that you were being arrested?

A No, sir.

• • • •

[252] Q (By Mr. Howard) Well, let me ask a further question. You suspected that it might be an arrest, a bust, didn't you?

A No, sir.

Q That never entered your mind?

A At what time?

[253] Q At the time that Officer Headricks was coming across this room and you went and got your gun and started firing at him?

A No, sir.

Q Never entered your mind?

A No, sir.

Q Do you recall him asking you these questions, giving these answers:

"Q" From Detective Hust—"What do you mean, 'all hell broke loose'?"

"Mincey: When he came back, a bust took place.

"Q A what took place? I can't read that word?

"A Bust. Bust."

MR. OSERAN: Excuse me, Your Honor.

Q (By Mr. Howard) "Question—

MR. OSERAN: Excuse me, Mr. Howard. This is not on the written statement, bust. Bust. And I would ask that that be stricken from the record.

If Mr. Howard wants to look at the written statement and correlate it, he'll see that that word does not exist twice.

THE COURT: Well, you may bring that out.

• • • •

[255] Q (By Mr. Howard) In answer to, "What do you mean, 'all hell broke loose' "? The text that I have says, "When he came back a bust took place."

THE COURT: I've lost it. Well—

MR. OSERAN: Looks—

THE COURT: Maybe you'd better tell me now, Mr. Oseran.

MR. HOWARD: I'm sure Detective Hust can straighten it out on this point.

MR. OSERAN: Well, here it is, right here.

THE COURT: Bring it up here, if you would please.

(Whereupon, document is handed to the Court.)

(Whereupon, an off-the-record discussion was had at the bench out of the hearing of the jury.)

THE COURT: All right. We only have one bust.

MR. OSERAN: I think that clarifies it, [256] Your Honor.

THE COURT: Very well.

Q (By Mr. Howard) Did you tell Detective Hust that when he came back—

MR. OSERAN: Your Honor—

Q (By Mr. Howard)—a bust took place?

MR. OSERAN: Asked and answered, Your Honor.

THE COURT: I think we're trying to clarify what the objection was.

THE WITNESS: Okay. Putting it together with what happened.

Q (By Mr. Howard) Did you tell him that?

A Tell him what, that a bust took place?

Q Yes.

A He had already told me that a policeman had been killed, so that's the only thing that could have happened.

Q And then were you also asked what took place? I can't read that word.

And then you—you wrote the word bust, single time.

A Well, he asked me what the word that I wrote in the first sentence.

• • • •

[290] REDIRECT EXAMINATION

Q When you first saw Brian with his gun in his hand in the hall coming towards you, did you stop and form an opinion as to what was happening?

A No, sir. I was reacting.

Q How did you react?

A Just the first thing I could do, turn around and get out of the way and get my gun.

Q Did you ask him if he was a police officer, if he was coming in to rob or kill you?

A No, sir.

Q Were you frightened at that time?

A Yes, sir.

[291] Q Did you think that you were going to get killed at that time?

A I thought he was going to shoot me.

Q Did he shoot you?

A Yes, sir.

Q Do you remember an officer Mr. Howard named as Officer Hust coming to talk to you in the hospital?

A I don't remember his name. I remember he came to see me.

Q And where were you in the hospital when he came to see you?

A In Intensive Care.

Q Can you describe what condition you were in at that time?

A Well, I know I couldn't move my leg. It was hurting pretty bad. As a matter of fact, the pain was unbearable.

Q Did you tell him the pain was unbearable?

A Yes, sir.

Q Did you have anything in your arms?

A Yes.

Q What did you have in your arms?

A I had—they had me hooked up to some needles, intravenous needles in my arms.

[292] Q Did you have any other tubes in your body?

A Yes, I had tubes down my throat, tube in my penis.

Q Did you have any tubes in your nose?

A Yes.

Q And that is the condition you were in when you were interrogated by the officer?

A Yes, sir.

Q Did you tell the officer several times that you really weren't clear on what had happened?

A Yes, sir.

Q Did you ask the officer at least a half a dozen times if you could have some legal guidance or an attorney?

A Yes, sir.

Q Did you ask the officer who the police officer was that was shot?

A Yes, sir.

Q Or which one the police officer was?

A Yes, sir.

Q Mr. Howard remembered if you asked—do you remember the officer asking you: "Did you have a gun?

"When I heard all the noise I run [293] to check it out and then I went back to the bedroom."

And then the next question the officer asked you was: "Where was Chuck?"

And you said: "Where was Chuck?"

And the officer said: "Yes."

MR. HOWARD: I'm going to object, Your Honor. I don't have any objection to him having the whole statement come in but I object to counsel just reading—

THE COURT: Overruled. I think he's getting to a question.

MR. OSERAN: Yes, I am, Your Honor.

THE COURT: And he's filling in.

Q (By Mr. Oseran) And then the officer said to you: "Did this guy that came into the bedroom have a gun?"

And you answered: "I can't say for sure. Maybe the guy had a gun."

Do you know whether he was referring to the guy that was standing over you saying, "Move, Nigger, move," or Brian?

A I don't know who he was—which guy he was talking about.

Q Did you know Brian had a gun?

A Yes, sir.

[294] Q How did you know? Because he shot you?

A Yes, sir.

Q Immediately after you said, "I can't say for sure. Maybe the guy had a gun," do you recall the officer asking you: "I would rather you stopped talking to me than to lie to me. If you're telling the truth, your story will be the same as John's and others."

Do you recall your response: "I don't tell any lies. I don't have to make things up to make the lie look like the truth. Let John talk all he wants. All he can tell is the truth or get caught telling a lie."

Do you recall telling him that?

A Yes, sir.

Q Do you remember the officer that was interrogating you having to leave the room and come back?

A Every time he left and came back, like I wasn't too sure it was the same guy or another day or what.

Q Did you later learn that that was all within a short period of time?

A Yes, sir.

Q Did you also learn the reason they left [295] the room was because you became exhausted and unconscious?

A Yes, sir.

Q Did you answer his questions to the best of your ability at that time in your condition?

A Yes, sir.

Q Did you tell the officer you were giving him the question (sic) to—to help him and to help bring the case to a close?

A Yes, sir.

Q Did you tell him you were telling the truth?

A Yes, sir.

Q To the best of your ability at that time?

A Yes, sir.

Q You didn't talk to him and tell him those things?

A No.

Q Why didn't you talk to him?

A I couldn't talk at the time.

Q Why couldn't you talk?

A Well, I had these tubes in my mouth and in my nose.

Q And you asked for a lawyer six times. [296] Did the officer tell you anything?

A Well, I don't know how many times I asked him, but I had asked him a group of times if he could get me a lawyer.

Q Did you tell him when you're charged with murder you don't—they won't have to prove you did it; you have to prove that you didn't do it?

A Yes, sir.

Q Is that how you think this system works; that you have to prove that you didn't do something?

A Yes, sir.

• • • •

IN THE SUPERIOR COURT OF THE
STATE OF ARIZONA
IN AND FOR THE COUNTY OF PIMA

No. A-26666

Date June 12, 1975

MARY ANNE RICHEY
Judge of the Superior Court

STATE OF ARIZONA
Plaintiff

RUFUS JUNIOR MINCEY
Defendants

JAMES HOWARD
Plaintiff's Attorney

RICHARD OSERAN
Defendants' Attorneys

MINUTE ENTRY

(VERDICTS)

JURY TRIAL—FIFTEENTH DAY

2:51 P.M. Defendant present. Same counsel present. Court Reporter Myron Stolle reporting.

Comes now the Jury under the charge of the bailiff, Francis Copham, and through their foreman announce that they have arrived at their verdicts in the case.

The Clerk reads the verdict of guilty of MURDER. First Degree, Count I, and inquires of the jurors if this is their verdict and the verdict of each of them, and they say that it is and so say they all.

The Clerk reads the verdict of guilty of ASSAULT WITH A DEADLY WEAPON, Count II, and inquires of the jurors if this is their verdict and the verdict of each of them and they say that it is and so say they all.

The Clerk reads the verdict of guilty of UNLAWFUL SALE OF NARCOTICS, Count III, and inquiries of the jurors if this is their verdict and the verdict of each of them and they say that it is and so say they all.

The Clerk reads the verdict of guilty of UNLAWFUL

MAXINE MOWRER
Deputy Clerk

MINUTE ENTRY

Page No. 2

Date June 12, 1975

Case No. A-26666

POSSESSION OF NARCOTIC DRUG FOR SALE, Count IV, and inquires of the jurors if this is their verdict and the verdict of each of them and they say that it is and so say they all.

The Clerk reads the verdict of guilty of UNLAWFUL POSSESSION OF A NARCOTIC DRUG, Count V, and inquires of the jurors if this is their verdict and the verdict of each of them, and they say that it is and so say they all.

On request of Mr. Oseran, the Clerk polls the Jury on Count I.

Jury is dismissed.

IT IS ORDERED that time of sentencing be set for July 1, 1975, 9:00 A.M.

Mr. Oseran moves for judgment of acquittal pursuant to Rule 20, notwithstanding the verdict as there is no substantiated evidence as to Count I, First Degree.

IT IS ORDERED the motion is denied.

Court stands at recess.

CC: Court Admn.
County Attorney
Bolding, Oseran, Barber & Zavala
Dept. Public Safety
Sheriff
Adult Probation

FILED IN COURT: Verdicts 5
Jury List
State's Requested Instructions
Deft's Requested Instructions
Sentencing Notification

MAXINE MOWRER
Deputy Clerk

IN THE SUPREME COURT OF THE STATE OF ARIZONA

In Banc

No. 3283

STATE OF ARIZONA, APPELLEE,

v.

RUFUS JUNIOR MINCEY, APPELLANT.

Appeal from the Superior Court of Pima County

(Cause No. 3-26666)

The Honorable Mary Anne Richey, Judge

Affirmed in Part and Reversed and Remanded in Part

BRUCE E. BABBITT — Phoenix
Attorney General

HEATHER A. SIGWORTH — Tucson
Assistant Attorney General

Attorneys for Appellee

RABINOVITZ, MINKER & DIX, P.C. — Tucson
BY ALBERT PERRY DOVER

BOLDING, OSERAN & ZAVALA — Tucson
BY RICHARD S. OSERAN

Attorneys for Appellant

GORDON, Justice:

Appellant, Rufus Mincey, was convicted in a jury trial of murder, first degree, in violation of A.R.S. §§ 13-451, 13-452 and 13-453, assault with a deadly weapon in violation of A.R.S. § 13-249 B, unlawful sale of narcotics in violation of A.R.S. § 13-1002.02, unlawful possession of narcotic drug for sale in violation of A.R.S. § 36-1002.01, and unlawful possession of narcotic drug in violation of

A.R.S. § 36-1002. He was sentenced to serve a term of life without possibility of parole until twenty-five years are served for Count I; to serve not less than ten nor more than fifteen years for Count II, to run concurrently with the life sentence; to serve not less than five years nor more than fifteen years for Count III, to run consecutively to the life sentence; to serve not less than five years nor more than six years for Count IV, to run concurrently with Count III; to serve not less than two years nor more than three years for Count V to run concurrently with Count III. We have jurisdiction to review this judgment under A.R.S. § 13-1711. The judgment of the trial court is reversed and remanded as to Counts I and II; judgment is affirmed as to Counts III, IV and V but remanded for resentencing.

This appeal arose out of a tragic incident in Tucson, Arizona on October 28, 1974. It began with a planned "buy-bust" by the Metropolitan Area Narcotics Squad, based originally on information from an informant. Although the testimony conflicts in some areas, on appeal we view the evidence in the light most favorable to upholding the verdict. The facts for the purpose of this appeal are as follows:

Sometime around 2 p.m. on October 28, 1974 undercover agent Barry Headricks of the Metropolitan Area Narcotics Squad went to the apartment leased by appellant. Accompanying Headricks was Charles Ferguson, the victim in the assault with a deadly weapon charge. Headricks, according to testimony, looked like a typical undercover narcotics officer: mustache and longish hair, cowboy boots, levis and a levi jacket. He also had a electronic monitoring device so that the other agents could overhear what went on.

After Headricks and Ferguson were admitted, a deal was made for the sale of a specified amount of narcotics and both appellant and Ferguson were charged with this sale. While in the apartment Headricks saw a gun in the possession of another man (probably Ferguson) in appellant's apartment. (Also in the apartment was appellant's girlfriend. When the agents returned later there were two more people in the apartment.) Headricks then

left the apartment with the purported purpose of returning with the money to pay for the drugs. Actually Headricks met a fellow agent and they and eight other officers prepared to carry out the prearranged plan to consummate the "buy-bust". [1]

Headricks and another agent (Schwartz), purportedly his "money man", went up to the door of the apartment with drawn guns hidden behind their backs. Eight other agents and a deputy county attorney were to be waiting with drawn guns out of sight of the doorway; in fact John Hodgman, who opened the door, apparently saw the other agents and tried to close the door. Headricks knocked on the door and when the door opened he announced that it was the police, according to one officer's testimony. Hodgman tried to close the door as Headricks slipped into the apartment. Agent Schwartz prevented the door from closing and he and other agents forced entry. As the door was forced back, Hodgman was pushed partly through the wall behind the door. Schwartz and at least one other agent held Hodgman to the ground and handcuffed him. Schwartz pointed his gun at a woman who was in the room and told her "police, freeze". Moments later another agent pointed his gun at her and, in more obscene terms, told her to freez or he'd blow her head off. At some time during these occurrences, a number of shots in rapid succession could be heard coming from the bedroom at the back of the apartment which Headricks had entered. It was later shown that both men emptied their guns shooting at each other. (One bullet, later shown to be from appellant's gun, came through the wall and grazed Ferguson's head where he was being held at gunpoint against the wall by another agent. Both men went down to the floor. This incident was the basis of the

[1] A "buy-bust" occurs when the undercover agent or agents make contact with a person who allegedly has illegal drugs for sale and make an offer to buy. If the agent sees the drugs or has enough information to be sure that the person does have the drugs, then an arrest is made. Commonly, as here, the plan is for the agent to leave momentarily and then a number of agents will come back to make the arrests. The usual plan is for the original undercover agent to get the door opened using his undercover identity and then the rest of the agents rush in.

assault with a deadly weapon charge.) Shortly after the shooting stopped, Headricks came out of the bedroom, said something like "he's down," and fell to the ground. Some agents ran to Headricks to give aid and someone called for emergency assistance. Meanwhile Agent Fuller went to the bedroom door and yelled "police officer, freeze" or "come out" or something of that nature. Fuller testified that he saw a movement on the other side of the bed and then nothing more. Fuller and another agent entered the room, proceeding along the side walls. Fuller saw a woman lying on a closet floor and asked her if she was all right. When she said no he told her to stay there and help would come soon. Fuller then crawled across the bed and found appellant lying on his back on the far side of the bed, with no visible wounds and with an automatic pistol under his hand. Appellant failed to respond to speech or to being prodded with Fuller's pistol. When the agents tried to move Mincey they saw blood underneath him and so they left him there until the ambulance came.

No weapons other than the pistol found near appellant's hand were found on any of the suspects. That weapon, a Llama .380 semi-automatic, was found to be empty when one of the agents examined it. Three other weapons were found in the living room during a subsequent search. Headricks' police special .38 revolver was also empty and was later shown to be the weapon which made those bullet holes not shown to have been caused by appellant's gun. When Headricks was taken out on a stretcher, a small semi-automatic pistol was found on the floor under where his body had been. Testimony at trial speculated that he had been carrying this second pistol in his belt at his back as is a common practice among undercover narcotics agents. The presence of the fourth pistol was not explained at trial, but it apparently had not been recently fired.

After the shootings, the narcotics agents did no investigating but waited for a special investigative team in accordance with Tucson Police Department procedure. The investigating officers searched the premises and examined the scene over a period of four days. No search warrant was obtained and no reason appears for not seeking one.

Although no witness was absolutely sure, the officers apparently learned of Headricks' death after the search of the scene began.

Three or four hours after appellant arrived at the hospital emergency room, Office Hunt interrogated him in the intensive care unit. Appellant was being fed intravenously, had a tube down his throat giving him oxygen to help him breathe, a tube in his nose down into his stomach to keep him from vomiting, and a catheter tube to his bladder. A nurse in the intensive care unit allowed the police officer to question appellant although appellant was unable to talk and had to answer by writing notes. Some of these answers were used in an attempt to impeach appellant by prior inconsistent statements at trial. Appellant was in pain but there is no evidence that he was sufficiently under the influence of medication to render his statements involuntary and inadmissible.

The interrogation began with questions concerning another wounded suspect. Then appellant learned he was charged with killing a police officer and was given his *Miranda* rights. The trial court granted appellant's motion to suppress this interview as to its use in the prosecution's case in chief but allowed its use for impeachment purposes. The interrogation lasted about one hour but the officer twice stopped the questioning when appellant either fell asleep or lapsed into unconsciousness.

On November 1, 1974 appellant was charged in a five-count indictment and on June 12, 1975 a jury returned guilty verdicts on all five counts. Appellant's motions for acquittal notwithstanding the verdict and for a new trial were denied and sentence was imposed on July 15, 1975. Thereafter appellant filed a timely notice of appeal to this Court.

Appellant raises a number of issues which we have rearranged and reworded so as to deal with them more concisely:

1. Did the jury instructions present an incorrect *mens rea* requirement for murder "committed in avoiding or preventing lawful arrest" (A.R.S. § 13-452), thereby compelling reversal?

2. Was it reversible error to permit the state to impeach appellant with statements made by him while he was in the hospital intensive care unit?

3. Was it reversible error to admit evidence that appellant had falsified information on the federal firearms form for appellant's pistol?

4. Was it reversible error to admit statements made by appellant two and one-half months before the incident?

5. Was it reversible error to deny defendant's motion to suppress on the basis of an illegal entry in violation of A.R.S. § 13-1411?

6. Was it reversible error to deny appellant's motion to suppress on the basis of an illegal warrantless search?

7. Was it reversible error to deny appellant's motion to sever the murder count from the other counts in the indictment?

8. Was the prosecutor's conduct in closing argument so inflammatory as to deny appellant a fair trial?

Mens Rea for the Murder Charge

Appellant was charged with murder "which is committed in avoiding or preventing lawful arrest", A.R.S. § 13-452. He alleges error in terms of the propriety of certain jury instructions but the underlying issue concerns the *mens rea* required for this kind of murder. This is an issue of first impression before our Court.

One challenged instruction reads:

> "If a person has knowledge, *or by the exercise of reasonable care should have knowledge*, that he is being arrested by a peace officer, it is the duty of such a person to refrain from using force (or any weapon) to resist such arrest.
>
> "However, if you find that the peace officer used excessive force in making the arrest, it is not the duty of such person to refrain from using reasonable force to defend himself against the use of such excessive force." (Emphasis added.)

The other challenged instruction reads:

> "A person who knows *or has reason to know* that he is being illegally arrested may use such force, short of taking life, as is necessary to regain his liberty.
>
> A person resisting an illegal arrest may use only that force reasonably necessary to effect that purpose.
>
> "A person who knows *or has reason to know* that he is being lawfully arrested has a duty to refrain from using any force to resist arrest." (Emphasis added.)

We agree that these instructions do not present the proper *mens rea* or scienter requirement for this kind of first degree murder. The provisions of A.R.S. § 13-452 under which appellant was charged does not expressly provide a scienter requirement. The rule, barring a few exceptions, is that wrongful intent or *mens rea* is required before there can be criminal punishment. State v. Cutshaw, 7 Ariz.App. 210, 437 P.2d 962 (1968); Dennis v. United States, 341 U.S. 494, 71 S.Ct. 857, 95 L.Ed. 1137 (1951). The exceptions occur only when the legislative power has expressly so determined, as where criminal negligence takes the place of the intent requirement. State v. Chalmers, 100 Ariz. 70, 411 P.2d 448 (1966). Where the penal statute fails to expressly state the necessary element of scienter, this Court may infer the scienter requirement from the words of the statute plus legislative intent. State v. Berry, 101 Ariz. 310, 419 P.2d 337 (1966).

We hold that the scienter requirement for first degree murder "which is committed in avoiding or preventing lawful arrest," A.R.S. § 13-452, is knowledge that the victim was a law enforcement officer. That is, a defendant is guilty under § 13-452 if the murder is committed while *knowlingly* avoiding or preventing a lawful arrest. This holding is based on the words of the statute and the legislative intent.

The words of this provision are similar to A.R.S. § 13-541 A, Resisting, delaying, coercing or obstructing public officer. This statute uses both the terms "wilfully" and "knowingly" in various provisions. We agree with the

Court of Appeals that § 13-541 requires knowledge on the part of the defendant that the other person is a public officer. State v. Tages, 10 Ariz.App. 127, 457 P.2d 289 (1969). It is logical to assume the Legislature intended a similar knowledge requirement in § 13-452.

Even more persuasive is the fact that we are dealing with a first degree murder statute which carries the most drastic penalty in our system of criminal justice—death. Such a penalty has traditionally required criminal intent as the *mens rea*, and a lesser mental state such as criminal negligence is covered in a manslaughter statute. *E.g.*, A.R.S. § 13-456. Our statute defining first degree murder, A.R.S. § 13-452, was amended in 1973 to add the avoiding or preventing lawful arrest provision. Proceeding this provision is the provision for wilful, deliberate or premeditated killing and following it is the felony murder provision. The first provision by its terms requires scienter, and the felony murder provision requires an intent to commit the underlying felony. State v. Akins, 94 Ariz. 263, 383 P.2d 180 (1963).

In this context the Legislature would not have intended the death penalty for a negligent killing nor would they have intended strict liability for killing a police officer even where the facts otherwise objectively show justifiable homicide. A knowledge requirement for first degree murder committed in avoiding or preventing a lawful arrest is mandated.

In fact, the jury was given a proper instruction because the trial court modified the state's requested jury instruction by adding the word "knowingly:"

> "A murder which is perpetrated by lying in wait or by any other kind of wilful, deliberate and premeditated killing, or which is perpetrated in *knowingly* avoiding a lawful arrest is murder in the first degree." (Emphasis added.)

So the issue is analogous to our recent decision in State v. Rodriguez, —— Ariz. ——, 560 P.2d 1238 (1977): conflicting jury instructions were given concerning the intent or *mens rea* necessary for conviction.

In *Rodriguez* we concluded under the facts of that case that the incorrect instruction was not so prejudicial as to require reversal. Two crucial facts in this determination were that other than the reading of the instructions, the incorrect instruction was never mentioned to the jury and that the correct intent requirement was "brought home forcefully to the jury in closing arguments no less than six times." State v. Rodriguez, —— Ariz. at ——, 560 P.2d at 1241.

The situation was exactly the opposite at appellant's trial. In closing argument the prosecutor emphasized the incorrect instruction, discussing it at least twelve times. The case went to the jury on an alternative theory of negligence ("knew or by exercise of reasonable care should have known"). Under these circumstances we have no way of knowing on what basis the jury determined appellant's guilt. Conviction under the avoiding arrest section of A.R.S. § 13-452 requires that the jury find the defendant acted knowingly. The jury here could have rendered a guilty verdict on the basis of negligence rather than knowledge.

For the foregoing reasons, we find the giving of the challenged instructions was prejudicial and reversible error. Accordingly, the judgment of the trial court as to Count I (murder, first degree) is reversed. Because the conviction on Count II (assault with a deadly weapon) may involve the same issues discussed *supra*, the judgment as to Count II is also reversed.

Statements in Intensive Care Unit

Under the circumstances described, *supra*, appellant was interrogated while in the Intensive Care Unit of the University of Arizona Hospital. *Miranda*[2] warnings were given, but after each indication from appellant that he wanted to consult an attorney or that he wanted to stop answering questions, the police officer continued to question appellant.

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[2] Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 94 (1966).

The United States Supreme Court held in Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed2d 694 (1966) that police must cease questioning when the suspect indicates he wishes to assert his right to remain silent or his right to an attorney. This mandate was recently affirmed in Michigan v. Mosley, 423 U.S. 96, 96 S.Ct. 321, 46 L.Ed.2d 313 (1975) and Oregon v. Haas, 420 U.S. 714, 95 S.Ct. 1215, 43 L.Ed.2d 570 (1975); cf. Brewer v. Williams, No. 74-1263 (U.S., Mar. 23, 1977). Statements made in violation of this rule are not admissible in the prosecution's case in chief but may be used for impeachment purposes (if the defendant takes the stand at trial) so long as traditional standards of voluntariness and trustworthiness are met. Oregon v. Haas, *supra;* Harris v. New York, 401 U.S. 222, 91 S.Ct. 643, 28 L.Ed.2d 1 (1971).

Prior to trial appellant made a motion to suppress the statements he made while being interrogated at the hospital, arguing their inadmissibility for all purposes because of violations of the requirement of *Miranda* and because of lack of voluntariness. A hearing was held as required by State v. Owen, 96 Ariz. 274, 394 P.2d 206 (1964), and testimony and oral argument were heard by the trial court. The court granted appellant's motion as to use of the statements in the prosecution's case in chief but denied the motion as to use for impeachment purposes.

The court did not make a specific finding as to the voluntariness of the statements. In 1964 the United States Supreme Court held that before a confession can be admitted into evidence, the trial judge must hold a hearing outside the presence of the jury and make a clear finding of voluntariness. Jackson v. Denno, 378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed.2d 908 (1964). Since then this Court has consistently held that failure to make a definite ruling on voluntariness before admission requires either a remand for the trial court to make such a finding or reversal unless the admission of the evidence itself was harmless error. State v. Marovich, 109 Ariz. 45, 504 P.2d 1268 (1973). This rule applies here because for the purposes of compliance with Jackson v. Denno, *supra*, there is no difference between confessions and admissions. State v. Owen, *supra*.

We stated in Marovich, *supra*, in dictum that denial of a motion to suppress could be tantamount to a finding of voluntariness where it is clear the trial court understood Jackson v. Denno and merely worded the ruling badly. We believe such a situation occurred here. Under the circumstances of this case, it is clear that a finding of voluntariness underlies the trial court's ruling and therefore the lack of *such* a specific finding is not reversible error.

In this case the prosecutor told the trial court that he did not intend to use these statements in his case in chief, and so his only argument at the hearing was that the statements were voluntary and admissible for impeachment purposes. The United States Supreme Court rule described *supra* is that to be admitted for impeachment purposes statements which violated *Miranda* must pass traditional voluntariness and trustworthiness standards. In the context of this case, the trial court's decision to exclude the statements in question for purposes of the prosecution's case in chief but to admit them for impeachment purposes can be based only on an underlying decision that the statements violate *Miranda* but do not offend traditional standards of voluntariness. We hold the failure to make specific findings, although error, is not reversible error under the specific circumstances of this case.

In addition to the problem of the lack of a specific finding of voluntariness appellant urges this Court to find reversible error because the statements were not in fact voluntary. It is well settled that the trial court's determination of the admissibility of a defendant's statement will not be overturned unless clear and manifest error appears. *E.g.* State v. Edwards, 111 Ariz. 357, 529 P.2d 1174 (1975). We look to the totality of the circumstances to decide if the statements were properly admitted. State v. Miller, 110 Ariz. 597, 522 P.2d 23, *cert. denied*, 419 U.S. 1004, 95 S.Ct. 325, 42 L.Ed.2d 281 (1974). The evidence in this case is sufficient to support the determination of the trial court.

There was testimony that the nurse in the intensive care unit gave the police officer permission to interrogate appellant and that she was present during the interroga-

tion. She testified that she had not given appellant any medication and that appellant was alert and able to understand the officer's questions. She also testified that neither mental or physical force nor abuse was used on appellant. She said that appellant was in moderate pain but was very cooperative with everyone. The interrogating officer also testified that appellant did not appear to be under the influence of drugs and that appellant's answers were generally responsive to the questions.[3] The officer testified that he used no force or coercion, neither mental or physical. Nor were any promises made. On the basis of this testimony the admission of the statements for impeachment purposes was not an abuse of discretion.

Appellant also makes some arguments concerning whether the impeaching statements are sharply contradictory to his testimony. These arguments go to the weight and not the admissibility of the evidence.

For the foregoing reasons we uphold the trial court's determination of the admissibility for impeachment purposes of appellant's statements made while in the hospital.

Admission of Federal Firearms Form

Appellant argues that admission of the federal firearms form on which he falsely denied he was a heroin addict is improper and inadmissible impeachment by prior misconduct and is irrelevant as well. Appellant admits in his brief, however, that it would be admissible to show intent, citing State v. Schmid, 107 Ariz. 191, 484 P.2d 187 (1971). It would also be admissible, of course, to impeach appellant by a prior inconsistent statement. Both of these bases for admission apply here and the evidence is, therefore, relevant also.

One aspect of the prosecution's case was to attempt to show that appellant had been planning to shoot any police officer who might "hassle" him, thereby negating appellant's self-defense claim. Appellant testified that he thought he had purchased the pistol used in the shooting

[3] We might add at this point the fact that appellant was able to write his answers in a legible and fairly sensible fashion provides further support for the trial court's determination.

some three or four weeks prior to the time he had actually purchased it. The implication of that part of his testimony was that the gun had been purchased with no specific purpose. The firearm form was introduced to show that it had been purchased very shortly before the shooting. Cross-examination of appellant also brought out the fact that appellant felt he would be unable to purchase a gun legally unless he lied about being a heroin addict. It is clear that admission of the firearms form is relevant both to the intent issue and to contradict appellant as to date of purchase, and it was admitted for these purposes.

Appellant also argues that even if this evidence is admissible, it is so highly prejudicial that its admission is reversible error. State v. Little, 87 Ariz. 295, 350 P.2d 756 (1960). The evidence here, however, is not highly prejudicial. The jury already knew that appellant was a heroin addict because of his testimony. Evidence of falsification of a federal firearms form is not sufficiently prejudicial to render inadmissible evidence admissible on two other valid grounds. The admission of this evidence was proper.

Statements Made Two and One Half Months Earlier

Appellant challenges the admission of a witness' testimony concerning a conversation which occurred two and one half months prior to the shooting. The witness testified that appellant said he planned to buy a sawed-off shotgun in case anyone hassled him or in case the pigs hassled him. Appellant, citing Wigmore on Evidence, §§ 394-396, argues that this statement concerning his mental state is inadmissible because (1) it is not a threat against a specific class, (2) there is no showing of a continuing mental state until the time of the shooting, and (3) the shooting incident was not a manifestation of the statement.

The statement in question can reasonably be interpreted as a threat against a specific class: police. Appellant does not argue there is any ambiguity in the meaning of the

term "pigs". That people in general were also included does not take away from the specificity of "pigs".

It is well settled that remoteness in time does not control admissibility of such evidence but rather is a factor to be considered by the jury in determining the weight of the evidence. Sparks v. State, 19 Ariz. 455, 171 P. 1182 (1918); State v. Moore, 111 Ariz. 355, 529 P.2d 1172 (1974). It is impossible to set definitive guidelines as to the time limits for evidence of a continuing state of mind. In State v. Moore, *supra*, we upheld admission of two statements made eighteen months and one year prior to the incident at issue. The time period here is, of course, much less remote and admission of the statement was proper. It is within the jury's province to determine the weight of such evidence.

Similarly, so long as it is a reasonable inference, it is within the jury's province to decide if the shooting incident is a manifestation of the earlier statement. In this case one reasonable inference from the evidence is that the shooting was a manifestation of appellant's earlier statement. The fact that belief in appellant's defense theory would lead one to the opposite inference does not create reversible error or, indeed, any error at all.

Appellant raises some other points but they all go to the weight of the evidence and that is not an issue on appeal. We hold the admission of the prior statement proper.

A.R.S. § 13-1411

Appellant argues that the arrest was illegal due to noncompliance with A.R.S. § 3-1411 and therefore his motion to suppress all evidence should have been granted. A.R.S. § 13-1411 provides:

> "§ 13-1411. Right of officer to break into building.
>
> "An officer, in order to make an arrest either by virtue of a warrant, or when authorized to make such arrest for a felony without a warrant, as provided in § 13-1403, may break open a door or window of any building in which the person to be arrested is or is reasonably believed to be, if the officer is refused admittance after he has announced his authority and purpose."

There was sufficient evidence for the trial court to find that A.R.S. § 13-1411 had been complied with. One officer testified that he heard Officer Headricks say police or something like that when the door was first opened. There was also testimony that at least one other officer announced his authority during the time the officers were trying to push open the door after it had been almost shut. Under all the circumstances of this case there can be no doubt that the person answering the door, when told it was the police, also knew their purpose. If one is in the midst of a drug buy, when the buyer announces that he is a police officer, his purpose is hard to misconstrue.

Appellant also discusses Headricks' entry into appellant's bedroom. That entry is relevant to the self-defense issue but not to A.R.S. § 13-1411 which deals only with breaking into a building not with actions after entry.

We uphold the trial court's denial of the motion to suppress regarding A.R.S. § 13-1411.

Warrantless Search

Appellant argues that the warrantless search of his apartment was illegal in violation of the Fourth Amendment of the United States Constitution. He alleges—correctly—that there were not sufficient facts to fit within the usual "exigent circumstances" exception and that there was ample time to secure a warrant. Thus the issue is whether this Court will adhere to its previous rulings which hold the search of a murder scene under certain circumstances to be a valid exception to the constitutional warrant requirement. State v. Sample, 107 Ariz. 407, 489 P.2d 44 (1971);[4] State v. Superior Court, 110 Ariz. 281,

[4] The United States Court of Appeals for the Ninth Circuit disagreed, Sample v. Eyeman, 469 F.2d 819 (9th Cir. 1972). There are, however, a number of other jurisdictions with some sort of murder scene exception: e.g., Stevens v. State, 443 P.2d 600 (Alaska 1968), *cert. denied*, 393 U.S. 1039, 89 S.Ct. 662, —— L.Ed.2d —— (1969); People v. Wallace, 31 Cal.App.3d 865, 107 Cal. Rptr. 659 (1973); Patrick v. State, 227 A.2d 486 (Del. 1967); State v. Chapman, 250 A.2d 203 (Me. 1969); State v. Oakes, 276 A.2d 18 (Vt.), *cert. denied*, 404 U.S. 965, 92 S.Ct. 340, 30 L.Ed.2d 285 (1971); Longuest v. State, 495 P.2d 575 (Wyo.), *cert. denied*, 409 U.S. 1006,

517 P.2d 1277 (1974); State v. Duke, 110 Ariz. 320, 518 P.2d 570 (1974).

After reviewing this issue we are reaffirming our rule. We will set some guidelines, however, because we support the principle that "[s]earches conducted without a warrant issued upon probable cause are 'per se unreasonable * * * subject only to a few specifically established and well-delineated exceptions.' Schneckloth v. Bustamonte, 412 U.S. 218 at 219, 93 S. Ct. 2041, at 2043, 36 L.Ed.2d 854, at 858 (1973)." State v. Sardo, 112 Ariz. 509, 543 P.2d 1133 (1975). With the guidelines, *infra*, in this opinion, search of a murder scene is such a "specifically established and well-delineated exception."

We hold a reasonable, warrantless search of the scene of a homicide—or of a serious personal injury with likelihood of death where there is reason to suspect foul play—does not violate the Fourth Amendment to the United States Constitution where the law enforcement officers were legally on the premises in the first instance. We chose not to limit this warrant requirement exception only to actual murders because immediate action may be important to determining the circumstances of death and because a reasonable search should not later be invalidated because the intended murder victim may be saved by a medical miracle. For the search to be reasonable, the purpose must be limited to determining the circumstances of death and the scope must not exceed that purpose. The search must also begin within a reasonable period following the time when the officials first learn of the murder (or potential murder). Cf. State v. Duke, *supra*.

We find the search of appellant's apartment falls within the murder scene exception to the Fourth Amendment warrant requirement. Although Officer Headricks may not have been dead before the search began, it was reasonable to believe that death was likely and that a murder charge was a possibility. The search was aimed

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93 S.Ct. 438, 34 L.Ed.2d 299 (1972). *Contra*, People v. Williams, 557 P.2d 404 (Colo. 1976). The United States Supreme Court has not disapproved of any of these decisions.

at establishing the circumstances of death (bullet trajectories, e.g.) and included evidence relevant to motive and intent or knowledge (narcotics, e.g.). The search began when the investigative unit arrived, in accordance with Police Department procedures. For these reasons, the search was legal and the trial court's denial of appellant's motion to suppress was proper.

Severance of the Murder Count

Appellant argues it was prejudicial, reversible error for the trial court to deny his motion to sever the murder count from the other counts listed in the indictment. We find no error. So long as the determination is within the guidelines of Rule 13.3 for joinder and Rule 13.4 for severance, of the Rules of Criminal Procedure, 17 A.R.S., it is within the trial court's discretion to deny appellant's motion. *E.g.*, State v. Williams, 108 Ariz. 382, 499 P.2d 97 (1972); State v. Boggs, 108 Ariz. 425, 501 P.2d 9 (1972).

We find Rule 13.3(a)(2) controlling as to joinder in this situation:

> "Rule 13.3 Joinder
>
> "A. Offenses. Provided that each is stated in a separate count, 2 or more offenses may be joined in an indictment, information, or complaint, if they:
>
> • • • •
>
> "(2) are based on the same conduct or are otherwise connected together in their commission * * *."

The murder, assault with a deadly weapon, and drug charges were all part of a continuing series of events, and are "otherwise connected together in their commission." *Cf.* State v. Tynes, 95 Ariz. 251, 389 P.2d 125 1964).

Rule 13.4(a) provides the standard for severance:

> "Rule 13.4 Severance
>
> "A. In General. Whenever 2 or more offenses or 2 or more defendants have been joined for trial, and

> severance of any or all offenses, or of any or all defendants, or both, is necessary to promote a fair determination of the guilt or innocence of any defendant of any offense, the court may on its own initiative, and shall on motion of a party, order such severance.
>
> * * * *

This Court will reverse the denial of a motion to sever only when a clear abuse of discretion is shown. State v. Dale, 113 Ariz. 212, 550 P.2d 83 (1976).

No such abuse of discretion, i.e. prejudice, can be shown here because the evidence as to the other counts would have been admissible at the murder trial even if severance had been granted. The evidence would be admissible on two bases: as relevant to the issue of intent and as part of the complete picture. State v. Schmid, *supra*; State v. Villavicencio, 95 Ariz. 199, 388 P.2d 245 (1964).

Since we find no prejudice, we hold the denial of the motion to sever was proper.

Prosecutor's Closing Argument

Appellant points to a single statement in the prosecutor's closing argument and argues that it is so inflammatory and prejudicial as to deprive him of a fair trial:

> "Don't tell every heroin pusher in town that he can have a gun; that he can have it loaded; that he can shoot a pig if he feels hassled and that all he need do, is take the witness stand and say, 'Yes, sir; no sir,' and claim that he had no idea that he was shooting a cop."

The rule in Arizona is that counsel may draw reasonable inferences from and appraise evidence which was adduced at trial. State v. King, 110 Ariz. 36, 514 P.2d 1032 (1973).

The statement in question is based on the evidence. There was testimony that appellant was a heroin dealer, that he had a loaded gun, that he shot a police officer, and his defense was that he had no idea that he was

shooting a police officer. It is a reasonable inference, if the evidence pointing to appellant's guilt is believed, that acquitting appellant might indicate to other heroin sellers that they could get away with the same thing.

The problem with the prosecutor's statement is that it is an emotional appeal to the jury's fears. Although in closing argument both counsel have wide latitude, State v. Landrum, 112 Ariz. 555, 544 P.2d 664 (1976), such an appeal to fear is improper. *Cf.* State v. Makal, 104 Ariz. 476, 455 P.2d 450 (1969); State v. Huson, 73 Wa.2d 660, 440 P.2d 192 (1968), *cert. denied*, 393 U.S. 1096, 89 S.Ct. 886, —— L.Ed.2d —— (1969). We need not determine, however, whether it was so prejudicial as to require reversal because we are reversing on other grounds, *supra*. If the murder and assault charges are retried on remand, we urge counsel to refrain from appeals to juror's fears.

Conclusion

For the foregoing reasons, the judgment of the trial court as to Counts I (murder, first degree) and II (assault with a deadly weapon) is reversed and remanded for proceedings consistent with this opinion. The judgment of the trial court as to Counts III, IV and V (unlawful sale of narcotics, unlawful possession of narcotic drug for sale and unlawful possession of narcotic drug, respectively) is affirmed. Because the sentence for Count III was to run consecutively to that of Count I (IV and V are concurrent with III) we are remanding on Counts III, IV and V for resentencing.

FRANK X. GORDON, JR.
Justice

CONCURRING:

JAMES DUKE CAMERON
Chief Justice

FRED C. STRUCKMEYER, JR.
Vice Chief Justice

HAYS, specially concurring.

I concur with the majority in all respects except that I take exception to the characterization of the county attorney's statement in argument as being "an emotional appeal to the jury's fears." If oral argument at the close of the case is to have any purpose, it must be more than a dull and sterile discussion of the evidence. The condemned statement is based on the evidence and the inference drawn therefrom is reasonable. It does not deprive the defendant of legitimate defenses nor does it exceed the bounds of propriety.

JACK D. H. HAYS
Justice

I concur.

WILLIAM A. HOLOHAN
Justice

IN THE SUPREME COURT OF THE
STATE OF ARIZONA

No. 3283

[Title Omitted in Printing]

MOTION FOR REHEARING

RUFUS JUNIOR MINCEY, the appellant herein, by and through the undersigned attorneys, hereby moves, pursuant to Rule 31.18, Ariz. R. Crim. P., for a rehearing of this Court's decision filed May 11, 1977 on the grounds and for the reasons expressed in the attached Memorandum, incorporated by reference herein.

RESPECTFULLY SUBMITTED this 12th day of June, 1977.

LAW OFFICES OF KLEIN & KLEIN

By /s/ Frederick S. Klein
FREDERICK S. KLEIN

BOLDING, OSERAN & ZAVALA

By /s/ Charles E. Giddings
for RICHARD S. OSERAN

MEMORANDUM

Appellant continues to rely on all positions and arguments previously made herein in his briefs and argument and nothing in this memorandum should be considered an abandonment thereof.

I.

THIS COURT ERRED IN UPHOLDING THE TRIAL COURT'S DETERMINATION OF THE ADMISSIBILITY FOR IMPEACHMENT PURPOSES OF APPELLANT'S RESPONSES TO POLICE QUESTIONING WHILE IN THE HOSPITAL'S INTENSIVE CARE UNIT.

The use of appellant's responses to police questioning while in the hospital's intensive care unit for impeachment purposes was reversible error and violated Appellant's right to due process of law and his privilege against self incrimination under the Fourteenth and Fifth Amendments to the Constitution of the United States. The responses involved were determined to have been obtained in violation of the requirements of *Miranda* v. *Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1964). This Court relies upon a limited exception to the Constitutional exclusionary rule of *Miranda* to sustain the admissibility for impeachment purposes of appellant's responses. The exception involved was stated in *Harris* v. *New York*, 401 U.S. 222, 91 S. Ct. 643, 28 L. Ed. 2d 1 (1971), and reiterated in *Oregon* v. *Haas*, 420 U.S. 714, 95 S. Ct. 1215, 43 L. Ed. 2d 570 (1975). For statements to come within the *Harris* exception, they must be (1) inconsistent with a defendant's testimony at trial bearing directly on the crimes charged and (2) must have been obtained under circumstances assuring their trustworthiness and voluntariness.

This Court has erroneously overlooked the first requirement of the *Harris* test and treated the lack of inconsistency as merely going to "the weight and not the admissibility of the evidence." Opinion at 17. The ra-

tionale for permitting an exception to the *Miranda* exclusionary rule is that the shield provided by *Miranda* should not be perverted into a license to testify inconsistently or perjuriously. That rationale becomes meaningless if the statements introduced to impeach are not in fact inconsistent. Furthermore, as the United States Supreme Court has recognized, it is basic to the law of evidence that before a prior statement can be used to impeach by inconsistency, the statement must indeed be inconsistent. *United States* v. *Hale*, 422 U.S. 171, 95 S. Ct. 2133, 45 L. Ed. 2d 99 (1975). And a witness must be given full opportunity to clarify his statement before impeachment testimony may be admitted. *The Charles Morgan*, 115 U.S. 69, 5 S. Ct. 1172, 29 L. Ed. 316 (1885).

The responses used for impeachment were not inconsistent with appellant's testimony at trial. Appellant testified that he had seen a gun in Officer Headricks' hand when Headricks entered the bedroom. As impeachment, appellee offered a statement made in response to a question which asked, did "this guy" who came into the bedroom have a gun? The response had been, "I can't say for sure. Maybe he had a gun," and appellant indicated that he hadn't been sure whether by "this guy" the interrogator had meant Headricks or the officer who found him after he'd been shot, or what. Appellant also testified that at the time Officer Headricks entered the bedroom with his drawn gun, appellant had no idea the entry was for purposes of making an arrest. Appellant offered a statement made in response to a question regarding what appellant had meant when he wrote down that all hell had broken lose. Appellant's response, given at a time when he had already been informed that he was under arrest and being charged with the murder of a police officer, was that he meant when the "bust" took place. That response simply indicated that several hours after Headricks entered his bedroom, and after appellant had been made aware that Headricks and his companions were police officers, and after appellant had been advised that he was under arrest and was being charged with murder, appellant knew that the commotion had resulted from a police "bust"; it did not indicate what appellant's knowledge or state of mind was at the time of the break-in.

This Court's analysis of the circumstances of appellant's arrest appears to concentrate on whether appellant was mentally competent to give statements. Of course, if appellant was not mentally competent at the time, he couldn't give a voluntary statement regardless of mental or physical pressure. But that is not the end of a voluntariness inquiry. Even if appellant was mentally competent, his responses to interrogation were involuntary and inadmissible as evidence if appellant's will had been overborne so that the statements were not his free and voluntary act. *E.g.*, *Sims* v. *Georgia*, 389 U.S. 404, 88 S. Ct. 523, 19 L. Ed. 2d 634 (1967); *Davis* v. *North Carolina*, 384 U.S. 737, 86 S. Ct. 1761, 16 L. Ed. 2d 895 (1966); *Haynes* v. *Washington*, 373 U.S. 503, 83 S. Ct. 1336, 10 L. Ed. 2d 513 (1963); *Townsend* v. *Sain*, 372 U.S. 293, 83 S. Ct. 745, 9 L. Ed. 2d 770 (1963); *Colombe* v. *Connecticut*, 367 U.S. 568, 81 S. Ct. 1860, 6 L Ed. 2d 1037 (1961); *Payne* v. *Arkansas*, 356 U.S. 560, 78 S. Ct. 844, 2 L. Ed. 2d 975 (1958); *Fikes* v. *Alabama*, 352 U.S. 191, 77 S. Ct. 553, 1 L. Ed. 2d 246 (1957); *Gallegos* v. *Nebraska*, 342 U.S. 55, 72 S. Ct. 141, 96 L. Ed. 86 (1951); *Haley* v. *Ohio*, 332 U.S. 596, 68 S. Ct. 302, 92 L. Ed. 224 (1948); *Ashcraft* v. *Tennessee*, 327 U.S. 274, 66 S. Ct. 544, 90 L. Ed. 667 (1946), *connected case*, 322 U.S. 143, 64 S. Ct. 921, 88 L. Ed. 1192 (1944); *Ward* v. *Texas*, 316 U.S. 547, 62 S. Ct. 1139, 86 L. Ed. 1663 (1942); *Chambers* v. *Florida*, 309 U.S. 227, 60 S. Ct. 472, 84 L. Ed. 716 (1940).

Whether there was any mental coercion used upon Appellant is a question for this Court and not Nurse Graham or the interrogating officer to decide. It is undisputed that Appellant at times during the interrogation looked exhausted, that Appellant had not slept for some time, that Appellant indicated he did not want to answer questions, that Appellant asked for and did not receive the assistance of counsel, that Appellant had little previous experience with the police, that Appellant could not speak, that Appellant was only about four hours out

of surgery, that Appellant was being fed intravenously, given oxygen by an oral tracheal tube, had a tube from his nose to his stomach to prevent him from aspirating vomit, was catheterized, that Appellant repeatedly indicated he was in pain and that his pain was unbearable, that at least twice Appellant lapsed into unconsciousness, that the only persons who had access to Appellant were the police and hospital personnel, that Appellant repeatedly expressed uncertainty as to his ability to accurately recall the facts, that the police refused to comply with Appellant's requests to break off questioning, and that Nurse Graham, instead of coming to Appellant's aid, encouraged him to give statements to the police. Appellant was helpless. He could not walk away from the police officer or even turn his back on him. He could not even speak to tell him to leave. He could only communicate by laborious writing. He was in pain, weak and confused. He asked to be left alone, but no one complied and no one came to his aid, not even the one person he should have been able to turn to, his nurse. Through it all, there was relentless questioning. Appellant must have known he would not be left alone until the officer obtained the statements he was seeking. Clearly, his will was overborne. Such cannot be considered circumstances assuring the voluntariness of his statements. It should be pointed out that all we can be sure of are Appellant's protestations and statements, since they were written out. There are no equally accurate records of what questions were asked or what conditions existed around Appellant. Nurse Graham's assertion that Appellant was in moderate pain is gratuitous and insubstantial since she could not know what degree of pain another person was experiencing and since what would be moderate pain to one accustomed to the sight of pained persons in a hospital may be excruciating to a person experiencing for the first time the deep pain of large caliber gunshot wounds.

II.

THIS COURT ERRED IN UPHOLDING THE ADMISSIBILITY OF EVIDENCE OBTAINED AS THE FRUIT OF THE WARRANTLESS SEARCH OF APPELLANT'S APARTMENT.

The court committed reversible error and violated the Fourth and Fourteenth Amendments to the Constitution of the United States when it denied Appellant's motion to suppress all the evidence seized in the warrantless search of Appellant's apartment.

> "The most basic constitutional rule in this area is that 'searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment —subject only to a few specifically established and well delineated exceptions.' *Katz* v. *United States*, 389 U.S. 347 at 357. The exceptions are 'jealously and carefully drawn', *Jones* v. *United States*, 357 U.S. 493 at 499, and there must be 'a showing by those who seek exemption . . . that the exigencies of the situation made that course imperative.' *McDonald* v. *United States*, 335 U.S. 451 and 456. '[T]he burden is on those seeking the exemption to show the need for it.'" *Collidge* v. *New Hampshire*, 403 U.S. 443, at 455, 29 L.Ed.2d 564, 91 S.Ct. 2022, (1971), *United States* v. *Soriano*, (5th Cir.) 482 F.2d 469 at 472 (1973).

The United States Supreme Court has not yet sanctioned an exception for murder or serious injury scenes. And as this Court is aware, the United States Court of Appeals for the Ninth Circuit has expressly rejected such an exception. *Sample* v. *Eyeman*, 469 F.2d 819 (9th Cir. 1972). But assuming arguendo that there is such a Constitutional exception, this case does not fall within it. In every one of the cases cited by this Court in its opinion as support for a murder scene exception, the police entered upon the scene to render emergency aid, often entering by consent, and in each

case the scope of search was limited. In the case at hand, the police entered the premises to make an arrest and this attempt precipitated the resultant injuries. In the case at hand, every item in the apartment was examined and inventoried over a four day period.

The first distinction is important because the asserted exception has evolved first and foremost as a justification for police to come without hesitation onto the scene of severe injuries, or potential injury, to render aid. Often in these cases, once justification is given for police coming onto the scene, there is no search, the items seized then being in plain view. The search in this case was completely unrelated to any need for rendering aid, and occurred long after the injured persons were removed from the premises. The instrumentalities of injury, the pistol shots, were known in this case before any search began and there was no need for treatment purposes to know more about the instrumentalities, as, for example, there might have been in a poisoning case.

The second distinction is important in that courts adopting a murder scene exception have sought to avoid turning this exception into a wholesale license to make warrantless searches in cases of crime involving bodily injury or death. This Court in fact states that the scope of search must not exceed the purpose of determining the circumstances of death (Opinion at 23); yet in this case, the search included inventoring the entire contents of the apartment (transcript of Suppression Hearing of February 3 and 4, 1975 at pp. 141-142) over a four day period. It must be conceded, since the premises in this case were secured prior to search and since the search extended over a four day period, that there were no circumstances which prevented the police from seeking a search warrant or necessitated an immediate search.

If this case falls within Arizona's conception of a murder scene exception, then there is no exception, only a license to evade the Fourth Amendment's search warrant requirement in cases of bodily injury. And worse, this decision will stand as encouragement to police to engage in reckless gunplay and violence. The warrant requirement is soundly based in a policy that intrusive searches should generally only be permitted where an independent magistrate, not the person conducting the search, has determined from facts known prior to a search, and not reconstructed with the benefit of hindsight, that the search is reasonable. This policy should not be lightly discarded. The formulation of a murder scene exception indicated in this Court's May 11, 1977 opinion does not rest upon exigent circumstances. It promotes searches based upon the searcher's perception of what is "a serious personal injury" and of whether "there is reason to suspect foul play," not a magistrate's; and it licenses virtually unlimited searches. Apparently all this is rationalized by an assumption that cases involving bodily injury are more serious than other cases and require less attention to the protection of individual rights. But how can one subjectively say that bodily injury cases are more serious breaches of societal law and security than rape, espionage, treason, extortion, robbery, counterfeiting, burglary, etc. And if warrantless searches are to be justified because of the seriousness of one class of crimes, why not for other classes?

III.

THIS COURT ERRED IN UPHOLDING THE ADMISSION IN EVIDENCE OF A FEDERAL FIREARMS FORM ON WHICH APPELLANT HAD DENIED BEING A HEROIN ADDICT.

Admission of the firearms form in question in this case was completely unjustified by the law of evidence and denied Appellant due process of law under the Fourteenth Amendment of the Constitution of the United States. This Court claims the form could have been admitted to impeach Appellant's testimony as to the date of purchase of his gun. However, extrinsic evidence cannot be used to impeach upon a collateral matter. *State* v. *Williams*, 111 Ariz. 511, 533 P.2d 1146 (1975); *State* v. *Little*, 87 Ariz. 295, 308, 350 P.2d 756, 764 (1960); *Crowell* v. *State*, 15 Ariz. 66, 76, 136 P. 279,

283 (1913). Regardless of whether the gun was purchased three weeks before or six days before Officer Headricks' death, it is undisputed that Appellant did not know Headricks at the time of purchase. The date of purchase was either irrelevant or collateral to the issue being tried, Appellant's mens rea. Further, a witness cannot be impeached by extrinsic evidence unless he has first been given opportunity to explain or deny the alleged inconsistent statement. *Kerley Chemical Corp.* v. *Producers Cotton Oil Co.*, 2 Ariz. App. 56, 57-58, 406 P.2d 258, 259-60 (1965). No such opportunity was given Appellant.

Alternatively, this Court claims the form would have been admissible to show intent. Yet it is undisputed that at the time the firearms form was completed, Appellant had not met Officer Headricks and none of the events leading to his death had yet occurred. How then does the date of purchase have any probative relation to Appellant's intent at the time Officer Headricks was shot? The prejudicial impact of this evidence of a prior federal crime, which labeled Appellant as a liar, a criminal and a bad person, far outweighed any probative value the form had. *Compare*, *Manning* v. *Rose*, 507 F.2d 889, 894-95 (6th Cir. 1974); *Brown* v. *Parratt*, 406 F.Supp. 1357, 1361 (D. Neb. 1975); *Dorsey* v. *State*, 25 Ariz. 139, 213 P. 1011 (1923).

IV.

THIS COURT ERRED IN UPHOLDING THE LAWFULNESS OF THE FORCED ENTRY ON THIS CASE.

The officers entry into Appellant's apartment was unlawful, violating A.R.S. § 13-1411 and Constitutional rights of privacy protected by the Fourth, Due Process Clause of the Fourteenth, Ninth Amendments and the penumbra of the First, Third, Fourth, Fifth and Ninth Amendments to the Constitution of the United States. The requirement that forced police entries must be preceded by an announcement of authority and purpose has a long history in our law, e.g., *In re Semayne's Case*,

77 Eng.Rep. 194 (K.B. 1603), and receives Constitutional protection. *See Ker* v. *California*, 374 U.S. 23, 87 S.Ct. 1623, 10 L.Ed.2d 726 (1963); *Meyer* v. *United States*, 386 F.2d 715 (9th Cir. 1967). *Cf.*, *Miller* v. *United States*, 357 U.S. 301, 78 S.Ct. 1190, 2 L.Ed.2d 1332 (1958); *State* v. *Mendosa*, 104 Ariz. 395, 454 P.2d 140 (1969).

In justifying the entry in the instant case, this Court's opinion relies exclusively on the testimony of Officer Schwartz. Officer Schwartz, who said he had been standing at arm's length from Officer Headricks, claimed Headricks said something about police, but couldn't say for sure what Headricks had said because "Barry always did talk kind of low." Schwartz also testified in less than credible fashion that after Headricks had entered the apartment, Schwartz himself "said something, the more I think about it, the more, through experience, I hollered I was a police officer, 'open the door'. . . ." Yet witness Carol Greenwalt who was sitting inside the apartment only a few feet from the doorway testified that she never heard any of the officers identify themselves as police officers and it is undisputed that the officers had dressed in plain clothes and Headricks, in particular, with his mustache, longish hair, flower print shirt, cowboy boots, levis and levi jacket sought to disguise his identity as a police officer. This Court concludes that an announcement of purpose was unnecessary since "in the midst of a drug buy, when the buyer announces that he is a police officer, his purpose is hard to misconstrue." That conclusion, however, assumes that if the police announced themselves as police, they did so in a manner that could be heard by the apartment occupants, an assumption not warranted by the evidence. Under the circumstances, the person at the door might just as well have assumed that those seeking entry with drawn guns were intent upon a drug rip-off or other illegal endeavor. Prophetically, it was said in *State* v. *Valenzuela*, 3 Ariz. App. 278, 280, 413 P.2d 788, 790 (1966):

> "We shudder to think of the consequences had the defendant, not hearing the officers identify them-

selves, or having no reason to believe they were officers, decided to protect his home . . . with a shotgun."

V.

THIS COURT ERRED IN UPHOLDING THE DENIAL OF APPELLANT'S MOTION TO SEVER AND IN NOT EXPRESSLY FINDING THE PROSECUTOR'S INFLAMMATORY CLOSING ARGUMENT TO HAVE CONSTITUTED REVERSIBLE ERROR.

It was reversible error and a violation of Appellant's right to a fair trial under the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States to deny Appellant's Motion for severance of the murder charge from the other charges upon which he was indicted. This Court concludes that Appellant was not prejudiced by the denial of severance. As examples of the prejudice done in this case, one can point to the injection of the unusual and inflamatory allegation of killing a Tucson police officer into the consideration of the other counts, *cf. State* v. *Williams*, 108 Ariz. 382, 386, 499 P.2d 97, 101 (1972), or the undue limitation on the Appellant's right to testify in his own behalf and the strong likelihood that his testifying with regard to the murder count while remaining silent on other counts would result in improper inferences of guilt being drawn. *See* A.B.A. Standards Relating to Joinder and Severance, page 31.

A further prejudice results from this Court's disposition of the matter of the prosecutor's inflamatory closing argument. The Court recognizes that the argument constituted an improper appeal to the jury's fears and was prejudicial, but avoids deciding that it was reversible error because the murder and assault convictions have been reversed. The prosecutor's argument was an invitation to the jury to ignore the law and evidence presented and render a judgment of punishment based upon fear and emotion. Since all counts were tried together, the inflamatory invitation to punish existed for all counts. This Court cannot conclude beyond a reasonable doubt

that an appeal to punish without regard to the law and evidence of the case was confined in its prejudicial impact to only two of the five counts tried together. *Compare Chapman* v. *California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967).

VI.

THIS COURT ERRED IN UPHOLDING THE ADMISSION OF APPELLANT'S ALLEGED CONVERSATIONS MADE TWO AND A HALF MONTHS PRIOR TO THE SHOOTING INCIDENT.

It was reversible error and a violation of Appellant's right to a fair trial under the Due Process Clause of the Fourteenth Amendment to the United States Constitution to permit the prosecution to impeach Appellant's testimony with a conversation allegedly had with Anthony Acosta. The conversation was said to have been made regarding the possible use of a shotgun brought by Appellant to Acosta's machine shop. This Court's opinion completely ignores the requirement that a continuing mental state be shown from the time of the statement to the time of the shooting. While the Court refers to statements made eighteen months and a year prior to the incident at issue permitted in *State* v. *Moore*, 111 Ariz. 355, 529 P.2d 1172 (1974), it neglects to note that in that case a similar statement was made a month before the incident, evidencing a continuing mental state. on the contrary, in this case Acosta testified that Appellant sold the gun under discussion a couple of days after the conversation and that Appellant did not express an apprehensive attitude toward authority. *See State* v. *Willits*, 2 Ariz. App. 443, 445, 409 P.2d 727, 729 (1966). The admission of this alleged conversation, in addition to being improper in its own right, prejudiced Appellant by permitting the inference that the trial court concluded that Appellant knew Headricks to be a police officer at the time of the shooting.

CONCLUSION

For all the foregoing reasons and those previously expressed, Appellant urges this Court to grant rehearing.

[Certificate of Service Omitted in Printing]

IN THE SUPREME COURT
STATE OF ARIZONA

No. 3283

[Title Omitted in Printing]

RESPONSE TO MOTION FOR REHEARING

COMES NOW the State, by and through BRUCE E. BABBITT, the Attorney General, and PHILIP G. URRY, Assistant Attorney General, and submits the attached Memorandum of Points and Authorities in response to Appellant's Motion for Rehearing.

Respectfully submitted this 21st day of June, 1977.

BRUCE E. BABBITT
The Attorney General

/s/ Philip G. Urry
PHILIP G. URRY
Assistant Attorney General
1005 Pioneer Plaza Building
100 North Stone Avenue
Tucson, Arizona 85701
Attorney for Appellee

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MEMORANDUM OF POINTS AND AUTHORITIES

I

Appellant contends in support of rehearing that this Court's opinion failed to consider the requirement of *Harris* v. *New York*, 401 US 222, 91 S.Ct. 643, 28 L.Ed. 2d 1 (1971) that a statement given in violation of *Miranda* v. *Arizona*, 384 US 436, 86 S.Ct. 1602, 16 L.Ed. 2d 694 (1964) must be "inconsistent with a defendant's testimony at trial bearing directly on the crimes charged" before it may be introduced for impeachment purposes. Appellant's Memorandum at 2. It is apparent that Appellant views this inconsistency requirement as mandating that the statements amount almost to a flat contradiction of the defendant's direct testimony. His contention is wrong for two reasons. First, neither *Harris* nor *Oregon* v. *Hass*, 420 US 714, 95 S.Ct. 1215, 43 L.Ed. 2d 570 (1975) established a *constitutional* requirement that the prior statements contradict the defendant's direct testimony, or even "contrast sharply" with it, as Appellant argued in his Opening and Reply Briefs. The *Harris* opinion's references to the sharply contrasting nature of the prior statements was merely descriptive. Further, the statement before the Court in *Oregon* v. *Hass*, *supra*, were inconsistent with the defendant's direct testimony, but could hardly be said to have contrasted sharply with it. In any event, it is clear from both *Harris* and *Oregon* v. *Hass* that the degree of inconsistency or contradiction is by no means crucial to the application of the *Harris* rule.

Appellant's contention is also erroneous because Appellant's prior statements were in fact inconsistent with his direct testimony. It is true that Appellant attempted to explain the inconsistencies from the witness stand. But neither the jury nor this Court was bound to accept those explanations.

Appellant also errs in asserting in essence that this Court failed to pursue the voluntariness inquiry beyond the question of whether Appellant was mentally competent. As this Court noted pursuant to *State* v. *Edwards*, 111 Ariz. 357, 529 P.2d 1174 (1975), the trial court's finding is not to be overturned in the absence of clear and manifest error. This Court properly found that no such error was committed in the instant case. As the Court noted in its opinion, Nurse Graham was present in the intensive care unit while Appellant was being questioned. She testified that Appellant was not under medication and was alert and able to understand the questioning. She also testified that the officer did not apply mental or physical coercion to Appellant. The interrogating officer substantially confirmed the nurse's testimony, and added that no promises were made. Although Appellant offers speculation concerning Appellant's subjective mental processes at the time of the questioning, he has presented nothing that would indicate clear and manifest error. This Court correctly upheld the trial court's ruling.

II

This Court's opinion rejected Appellant's contention that the search of his apartment violated the Fourth Amendment. The Court stated:

> "We hold a reasonable, warrantless search of the crime scene of a homicide—or of a serious personal injury with likelihood of death where there is reason to suspect foul play—does not violate the Fourth Amendment to the United States Constitution where the law enforcement officers were legally on the premises in the first instance. We chose not to limit this warrant requirement exception only to actual murders because immediate action may be important to determining the circumstances of death and because a reasonable search should not later be invalidated because the intended murder victim may be saved by a medical miracle. For the search to be reasonable, the purpose must be limited to determining the circumstances of death and the scope must not exceed that purpose. The search must also begin within a reasonable period following the time when the officials first learn of the murder (or potential murder)." Slip Opinion at 23.

Appellant now contends that the search in the instant case was not in fact within the murder scene exception to the warrant requirement. His contention is wrong. The murder scene exception is not conceptually dependent upon an initial entry by the police to render emergency aid; a legal entry is all that is needed. *See Stevens* v. *State*, 443 P.2d 600 (Alaska 1968). Here the entry was made to effect a lawful arrest. Further, it is clear from *State* v. *Superior Court*, 110 Ariz. 281, 517 P.2d 1277 (1974) that the scope of the search is not limited by the purpose to render emergency aid. In *State* v. *Superior Court* the court stated:

> "Where the police are called to the scene of a homicide, they may lawfully investigate such portions of the premises as are *reasonably necessary to establish the true facts of the homicide*." 110 Ariz. at 281. (Emphasis added.)

Referring to *Stevens*, *supra*, the court in *State* v. *Chapman*, 250 A.2d 203 (Maine 1969) stated:

> ". . . we find persuasive the Court's views as to the right and obligation of the police to make a thorough investigation of premises on which a violent death has occurred, even to the extent of securing the aid of trained and experienced investigators. We note especially the view expressed that the police, by keeping control of the death scene, do not lose the benefit of their initial lawful entry." 250 A.2d at 208.

The *Chapman* court stated the rationale for the murder scene exception as follows:

> "There is no more serious offense than unlawful homicide. The interest of society in securing a determination as to whether a human life has been taken, and if so by whom and by what method, is great indeed and may in appropriate circumstances rise above the interest of the individual in being protected from governmental intrusion upon his privacy." 250 A2d at 210.

The scope of the search in the instant case was properly limited to determining the circumstances of Officer Headrick's death. The length of time consumed indicated thoroughness rather than overbreadth of scope. This Court properly sustained the search under the murder scene exception.

Appellant predicts the Court's decision "will stand as encouragement to police to engage in reckless gunplay and violence." Motion for Rehearing at 8. Appellant's fears are exaggerated. It is unlikely that police will undertake to create situations in which people are killed merely to take advantage of the opportunity to make warrantless searches of the resulting murder scenes.

III

Appellant contends that the federal firearms form was improperly introduced into evidence. His arguments on this point are substantially similar to those he raised in the briefs. The State will therefore stand on its Answering Brief as to this issue, and will offer no further argument.

IV

Appellant also contends this Court erred in holding that the arresting officers complied with A.R.S. § 13-1411. His attack on this holding is based upon Officer Schwartz' alleged lack of credibility and Appellant's assessment of the proper weight to be given to the testimony of Carol Greenwalt. It is also based upon speculation that at the time of the entry Officer Headricks still sought to disguise his identity. Appellant's contention that Officer Headricks did not announce his identity is substantially undercut by the fact that immediately after he entered the apartment the occupants attempted to bar the remaining officers by force. In any event, questions concerning the weight of the evidence are not appropriately raised in a motion for rehearing. The trial court's finding of compliance with A.R.S. § 13-1411 was supported by substantial evidence, and this Court properly sustained it.

V and VI

The contentions raised by Appellant in Arguments V and VI are substantially the same as those he raised earlier in his Opening and Reply Briefs. As to those arguments, the State will stand on its Answering Brief and will not present further argument. This Court correctly resolved such arguments against Appellant.

CONCLUSION

For the foregoing reasons the State respectfully urges this Court to deny rehearing.

Respectfully submitted this 21st day of June, 1977.

BRUCE E. BABBITT
The Attorney General

/s/ Philip G. Urry
PHILIP G. URRY
Assistant Attorney General
1005 Pioneer Plaza Building
100 North Stone
Tucson, Arizona 85701
Attorney for Appellee

[Certificate of Service Omitted in Printing]

SUPREME COURT
STATE OF ARIZONA
PHOENIX

85007

Supreme Court No. 3283

Pima County No. 26666

June 29, 1977

STATE OF ARIZONA, APPELLEE

vs.

RUFUS JUNIOR MINCEY, APPELLANT

The following action was taken by the Supreme Court of the State of Arizona on June 28, 1977 in regard to the above-entitled cause:

"ORDERED: Motion for Rehearing (Attorney General)—DENIED.

FURTHER ORDERED: Motion for Rehearing (Appellant)—DENIED."

Copy of Order Affirming in Part and Reversing and Remanding in Part enclosed.

CLIFFORD H. WARD
Clerk

By /s/ Mary Ann Hopkins
Deputy Clerk

TO: Hon. Bruce E. Babbitt, Attorney General, 159 Capitol Building, Phoenix, Arizona 85007

Heather A. Sigworth, Assistant Attorney General, 100 North Stone, Suit 1005, Tucson, Arizona 85701

Stephen D. Neely, Pima County Attorney, 111 West Congress, Tucson, Arizona 85701

Richard S. Oseran, Esq., Bolding, Oseran & Zavala, P.O. Box 70, La Placita Village, Tucson, Arizona 85702

Frederick S. Klein, Esq., Klein & Klein, 100 North Stone, Suite 306, Tucson, Arizona 85701

Rufus Junior Mincey, Arizona State Prison, Box B-34490, Florence, Arizona 85232

dkb

IN THE SUPREME COURT OF THE
STATE OF ARIZONA

No. 3283

STATE OF ARIZONA, APPELLEE

vs.

RUFUS JUNIOR MINCEY, APPELLANT

ORDER AFFIRMING IN PART AND REVERSING
AND REMANDING IN PART

Appeal from the Superior Court of Pima County

Number 26666

Honorable Mary Anne Richey, Judge

Bruce E. Babbitt, The Attorney General
by Heather A. Sigworth, Assistant Attorney General
Attorneys for Appellee

Rabinovitz, Minker & Dix, P.C.
by Albert Perry Dover
Bolding, Oseran & Zavala
by Richard S. Oseran
Attorneys for Appellant

This cause having been heretofore submitted, and the Court having duly considered same, and being now advised in the premises, files its Opinion. It is accordingly

ORDERED that the judgment of the trial court as to Counts I (murder, first degree) and II (assault with a deadly weapon) is reversed and remanded for proceedings consistent with this opinion; the judgment of the trial court as to Counts III, IV and V (unlawful sale of narcotics, unlawful possession of narcotic drug for sale and unlawful possession of narcotic drug, respectively) is affirmed; because the sentence for Count III was to run consecutively to that of Count I (IV and V were concurrent with III) we are remanding on Counts III, IV and V for resentencing, to comply with the Opinion of this Court, attached hereto.

DONE IN OPEN COURT this 11th day of May, 1977.

STATE OF ARIZONA
SUPREME COURT

I, CLIFFORD H. WARD, Clerk of the Supreme Court of the State of Arizona, hereby certify the above to be a full and true copy of the Order Affirming in Part and Reversing and Remanding in Part, made and entered in the above entitled cause by said Court on the 11th day of May, 1977.

IN WITNESS WHEREOF, I hereunto my hand and affix the official seal of said Court this 29th day of June, 1977.
CLIFFORD H. WARD
Clerk

By /s/ Mary Ann Hopkins
Chief Deputy Clerk

cc: Hon. Bruce E. Babbitt, Attorney General; Heather A. Sigworth, Assistant Attorney General, Tucson; Stephen D. Neely, Pima County Attorney; Hon. Harry Gin, Presiding Judge of Pima County; Department of Corrections; Superintendent of Arizona State Prison; Richard S. Oseran, Esq.; Frederick S. Klein, Esq.; Rufus C. Mincey; Edna Blank, Court Administrator for Pima County.

SUPREME COURT OF THE UNITED STATES

No. 77-5353

RUFUS JUNIOR MINCEY, PETITIONER

v.

ARIZONA

ON PETITION FOR WRIT OF CERTIORARI TO the Supreme Court of the State of Arizona.

ON CONSIDERATION of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

October 17, 1977

☆ U. S. GOVERNMENT PRINTING OFFICE: 1977 25195 103

77-5353

i.e. [illegible]

A 58 Today

Elizabeth B. Ekaham RN
2010 10/28/74 Sdell
Arizona ~~Tucson~~ Medical Center

Ph 7.44
36
102
95.3
24.2 40%

Case No. A-26666

Frances E. Gibbons, Clerk

By Deputy

3283

ENTER 1. Date & Time 2. Problem Name & No. | S - Subjective A - Assessment | O - Objective P - Plan

L. Hurst 10-28-74
2015

1

-2-

UNIVERSITY OF ARIZONA
ARIZONA MEDICAL CENTER
UNIVERSITY HOSPITAL

PROGRESS NOTES

ENTER 1. Date & Time 2. Problem Name & No.	S = Subjective A = Assessment O = Objective P = Plan
	2

Frank C. Schoy 10-28-74 2100
Nurse Coordinator, Surgery
University Hospital

20:15

1. Date & time 2. Problem Name & No. | S - Subjective O - Objective A - Assessment P - Plan

I was present during this interview. Elle St. gave all voluntary. Elizabeth B Gaffney RN University Hospital 10-28-74 2100

I KNEW him for 2 DAYS
Dud with BEARD
Chuck
FAIR He has A Ride at the fair in south Tdud

Every body know every body

I Remember some body standing over me saying move bigger move I was in the floor beside the bed
(Do you know how he got in?)
This is all I can say without A Lawyer.
(If all now can't talk don't have to answer question)
I'm going to have to put my head together. There are so many things that I don't remember. I. Like how did they get into the Apt.
(How did who)
Police
Do you me Did he give me some money (NO)
What do you call A sample
I CAN'T SAY without A Lawyer

Let me get my self together first. You see I'm not for sure every thing happened so fast. I CAN'T Answer. At this time because I don't think so. But I CAN'T SAY for sure.
Some questions AREN'T clear to me at the present time. This writing was used a means of
L TO [illegible]

3

Nurse Coordinator, Surgery
University Hosp. 2100 10-28-74
3

1. Date & time 2. Problem Name & No. | S - Subjective O - Objective A - Assessment P - Plan

I was present during this interview - The St. gave voluntary. Elizabeth B. Gaffney RN 10-28-74 2100

talking because I could not TALK at the time of the interview.

If Its possible to get A Lawer now. we can finish the talk. He could direct me in the right Direction where as without a Lawyer I might SAW something thinking that it means something else. Is it still inside me?
My Right Leg I can't use it I can't even move it. The pain is unbearable. I'll help you if I CAN in every way possible

My name is A1C Rufus J Mincey
100 FMS Davis Monthan
BLKs 4202 B 24.
3550 shop.

would you please let some one know where I am.

4

UNIVERSITY OF ARIZONA
ARIZONA MEDICAL CENTER
UNIVERSITY HOSPITAL

PROGRESS NOTES

ENTER 1. Date & Time 2. Problem Name & No.	S = Subjective O = Objective A = Assessment P = Plan 1/2
	I CAN'T SAY. I HAVE to see a LAWYER
	I'm charged with murder so the
	police man says. Where is Debra
	I don't know who the police man WAS.
	Which one was the NARK
	Did he wear on cowboy boots.
	There ARE A lot of things that
	AREN'T Clear. Two guys are dead
	The one with the beard.
	John, who else
	When Do we go to TRAIL
	You didn't see anybody else
	No one saw anybody else. IN
	the Apt. Well get it together.
	why. It's void I I don't sign
	I hate to sign things in the Blind
	This information was given
(HUST	so that It might Bring this case to a end.
	You asked me some questions and
	I answered to the best of my ability
	At the present time. This is not
	to say I can't change my Information
	at a later Date, because I'm not
	sure as of now

UNI-12-25 (rev 3/73)

UNIVERSITY OF ARIZONA
ARIZONA MEDICAL CENTER
UNIVERSITY HOSPITAL

FLOW SHEET

I was present while Pt wrote voluntarily. Elizabeth B. D... 10/28/74 2200
University Hospital
2230 10-28-74

No Body knew John + his old lady went for a walk to see where chuck went. They came back and said chuck was in the car with 2 guys. One of the guys came with chuck. He left and when he came back all hell turned loose. When he came back a bust ~~[illegible]~~ took place. Bust you see I'm not for sure. People were all over the house I couldn't figure out whether it was a bust or rip off. I have a gun in the house 380 No place in particular. I showed it to Chuck and he showed me his. Look like a 38 sp. Take to the car with him (he didn't take any drugs out of the Apt) that's for sure. When he left. By his self.

Rufus J. Mincey

UNI-12-01

8

I can sign this because I remember those things. Not because John is talking some bullshit.

UNIVERSITY OF ARIZONA
ARIZONA MEDICAL CENTER
UNIVERSITY HOSPITAL

I was present while the Pt. voluntarily wrote this. Elizabeth B. Strahom RN 10-28-74 2320

FLOW SHEET

Thats why I have to have time to redo ~~the~~ every thing that happened in my mind

nobody answered Door wit gun.

John Didn't have A gun
you see that's something
on me. I was in the
Bed Room. Lets
Rap tomarrow. face to
face. I can't give facts
If something happins that
I don't know about. why
would chuck give John
his gun. if he came
with the guy

Questions I need to
know.
when I heard All the
noise I run out
to check it out then
I went Back to the
Bed room. where was chuck
I can't say for sure maby
the Guy had A Gun

UHI-12-01

UNIVERSITY OF ARIZONA
ARIZONA MEDICAL CENTER
UNIVERSITY HOSPITAL

I was present while the Pt. voluntarily wrote this. Elizabeth B. Skolimen
10-28 74 2320

FLOW SHEET

If I don't Tell any lies I don't
have to make things up to make
the Lie Look Like the truth. Let
John talk. All he can do is tell the
truth. or get caught telling a Lie.
Same, Same. I want a good Lawyer.
I charged with murder thats bad
weather you did it or not. you don't
have to prove you did something
you have to " " didn't

Ohd. how many Dudes came
through that Door.

what Time will you come tomarrow.
I'll be waiting I don't have to Like
I want some Legual guideance
I can't talk now what good
is this doing. Every thing I have said
is the truth. There are a lot of thing
Left out. After I get a Lawyer
you'll come. I won't Lie
my Leg hurt I want to try to go to sleep.
Tell Deb That I miss her.

UHI-12-01

STATE OF ARIZONA) ss.
COUNTY OF PIMA)

The foregoing instrument is a full, true, and correct copy of the original on file in this office.

Attested Oct 26 1977

NORMA M. FELIX, Clerk

By Jeanie Stull Deputy